Supreme Court, U.S.
FILED
FEB 5 - 2004
OFFICE OF THE CLERK

No. 03-959

In The
Supreme Court of the United States

CLARA VARCO,

Petitioner,

v.

ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

THOMAS H. LAWRENCE
Counsel of Record
JOHN M. RUSSELL
LAWRENCE & RUSSELL, LLP
5050 Poplar Avenue
Suite 1717
Memphis, Tennessee 38157
Telephone: (901) 844-4430
Facsimile: (901) 844-4435

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

a) Does the decision of the Seventh Circuit panel below conflict with this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002)?

b) Does the decision of the Seventh Circuit panel below conflict with the Ninth Circuit's decision in *Westaff, Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111(2003)?

c) Does the decision of the Seventh Circuit panel below conflict with other decisions of the Seventh Circuit?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan states that it is the fiduciary of the Associates' Health and Welfare Plan, which is sponsored by Wal-Mart Stores, Inc. Wal-Mart Stores, Inc. is a publicly held Arkansas corporation, and there are no parent corporations or publicly held companies owning 10% of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Denying Review	4
I. The Seventh Circuit's decision does not conflict with this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*	4
A. In *Great-West Life*, this Court found that federal courts can preside over an ERISA plan's claim for reimbursement when the plan seeks equitable relief under 29 U.S.C. § 1132(a)(3)	4
B. The Seventh Circuit's decision clearly follows this Court's holding in *Great-West Life*	6
C. A claim for equitable restitution will not always lie	9
II. The decision below does not conflict with other circuit court decisions	10
III. The decision below does not conflict with other decisions within the Seventh Circuit	14
IV. There is no issue of substantial importance	17
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Admin. Comm. of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco, 338 F.3d 680 (7th Cir. 2003) 7

Allison v. Wellmark, Inc., No. C00-3015-MWB, 2002 U.S. Dist. LEXIS 24168 (N.D. Iowa Oct. 15, 2002) 9

Bauhaus USA, Inc. v. Copeland, 292 F.3d 439 (5th Cir. 2002) 9, 13

Bauer v. Camrud, Maddock, Olsen & Larson, Ltd., Nos. A3-00-161, A3-02-27, 2002 U.S. Dist. LEXIS 7246 (D. N.D. Apr. 22, 2002) 8

Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough, P.C., No. 03-10195, 2003 U.S. App. LEXIS (5th Cir. Dec. 17, 2003) 8, 13, 17, 18

Forsling v. J.J. Keller & Associates, Inc., 241 F. Supp. 2d 915 (E.D. Wis. 2003) 8, 16

Gerosa v. Savasta & Co., 329 F.3d 317 (2d Cir. 2003) 9, 13

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) ..... *passim*

Great-West Life & Annuity Ins. Co. v. Brown, 192 F. Supp. 2d 1376 (M.D. Ga. 2002) 8

Honolulu Joint Apprenticeship and Training Comm. of United Assoc. Local Union No. 675 v. Foster, 332 F.3d 1234 (9th Cir. 2003) ..... *passim*

Hotel & Restaurant & Bar Employees Fringe Benefit Funds v. Mui Trong, No. 01-873, 2002 U.S. Dist. LEXIS 1697 (D. Minn. Jan. 31, 2002) 11

TABLE OF AUTHORITIES – Continued

Page

IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt, 211 F. Supp. 2d 812 (N.D. Tex. 2002) 8

Leipzig v. AIG Life Ins. Co., 257 F. Supp. 2d 1152 (N.D. Ill. 2003) 16

Primax Recoveries, Inc. v. Lee, 260 F. Supp. 2d 43 (D. D.C. Apr. 15, 2003) 8

Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544 (7th Cir. 2003) 14, 15

Primax Recoveries, Inc. v. Young, No. 02-2115, 2003 U.S. App. LEXIS 25786 (4th Cir. Dec. 18, 2003) 13

Pullins v. Associated Material Handling Inds., Inc., No. 1:03-cv-0099-JDT-WTL, 2003 U.S. Dist. LEXIS 12439 (S.D. Ind. May 20, 2003) 11

Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Wells, 213 F.3d 398 (7th Cir. 2000), *cert. denied*, 531 U.S. 985 (2000) 15, 18

Wellmark, Inc. v. DeGuara, 257 F. Supp. 2d 1209 (S.D. Iowa 2003) 8

Westaff Inc. v. Arce, 298 F.3d 1164 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003) 10, 11, 12

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 3

28 U.S.C. § 1332 3

28 U.S.C. § 1132(a)(3) [§ 502(a)(3)] ..... *passim*

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Seventh Circuit (*See* Varco Petition, App. B) was entered on July 29, 2003, and is reported at 338 F.3d 680 (7th Cir. 2003). The order denying petition for rehearing *en banc* (*See* Varco Petition, App. A) was entered by the Seventh Circuit Court of Appeals on August 22, 2003, and is reported at 2003 U.S. App. LEXIS 17772 (7th Cir. 2002). The opinion of the United States District Court for the Northern District of Illinois granting summary judgment to respondent (*See* Varco Petition, App. D) was issued on October 2, 2002, and it is reported at 2002 U.S. Dist. LEXIS 18933 (N.D. Ill. 2002). The order of the United States District Court for the Northern District of Illinois, denying petitioner's motion to dismiss for lack of subject matter jurisdiction (*See* Varco Petition, App. E at 50-52) was entered on January 14, 2002, and is reported at 2002 U.S. Dist. LEXIS 530 (N.D. Ill. 2002).

STATEMENT OF JURISDICTION

Petitioner invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The operative statutory provision, § 502(a)(3) of the Employee Retirement Income Security Act of 1974, found at 29 U.S.C. § 1132(a)(3), provides:

(A) Persons empowered to bring a civil action. A civil action may be brought –

. . .

(3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

STATEMENT OF THE CASE

Clara Varco was injured in an automobile accident. At the time of her accident, Varco was a participant in the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan (the "Plan"). Pursuant to its terms, the Plan paid $18,865.72 in benefits on behalf of Varco as a result of those injuries. While the Plan provides that Varco, as a participant, is entitled to receive benefits, the Plan does not allow her to enjoy a "double recovery" of benefits for her injuries – one payment from the Plan and one from the other parties Varco sued in an Illinois state court. Instead, the Plan requires that Varco reimburse the Plan to the extent of benefits paid when she makes a recovery from another party.

Varco filed an action in an Illinois state court seeking recovery for her injuries. Upon recovering a total of $100,000.00 from the responsible third-party and her underinsured motorist carrier, Varco refused to fully reimburse the Plan.

Instead, her attorney, Laurence Dunford, told the Committee's counsel that he was disbursing the funds to Ms. Varco. The Plan filed this action, alleging federal question subject matter jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1332, and § 502(a)(3) of the Employee Retirement Income Security Act, 29 U.S.C. § 1132. (*See* Varco Petition, App. F). The Plan sought to enforce its rights by way of injunction, declaratory judgment, constructive trust, or restitution. The Committee obtained a temporary restraining order and preliminary injunction prohibiting Varco and Dunford from disbursing the funds. Despite the fact that the district court had taken control of the funds, Dunford attempted to return to state court to have that court determine the Plan's rights. The Plan sought, and obtained, an injunction staying the state court action pending a final determination in the court below.

Varco filed a motion to dismiss, for among other reasons, lack of federal subject matter jurisdiction. This motion was denied on January 14, 2002. (*See* Varco Petition, App. E at 47a-49a). Varco filed an interlocutory appeal. (*See* Varco Petition, App. B at 3a). The parties thereafter filed cross motions for summary judgment.

On October 2, 2002, the district court granted the Committee's motion for summary judgment, but held that the Illinois Common Fund Doctrine applied to the Committee's reimbursement amount despite the fact that the plan provision specifically provides that all attorney's fees are the responsibility of the participant. The order granting summary judgment found that the plan was entitled to reimbursement pursuant to the terms of the Plan, but that in accordance with the Common Fund Doctrine, Varco was entitled to credits for the plan's pro-rata share of attorney's

fees and cost attributable to the recovery. (*See* Varco Petition, App. D).

Varco filed an interlocutory appeal of the decision issuing a preliminary injunction, and denying her motion to dismiss for lack of subject matter jurisdiction. (*See* Varco Petition, App. B at 6a). After the district court granted summary judgment, the Plan appealed the finding that the Illinois Common Fund Doctrine applied to the Plan's claim for reimbursement. These appeals were consolidated. (*See* Varco Petition, App. B at 8a). The panel below, in an opinion issued by the Seventh Circuit Court of Appeals, affirmed the district court's denial of Varco's motion to dismiss, and reversed the trial court's finding that the Illinois Common Fund Doctrine applied to an ERISA plan's suit to enforce its right to reimbursement.

REASONS FOR DENYING REVIEW

I. The Seventh Circuit's decision does not conflict with this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson.*

A. In *Great-West Life*, this Court found that federal courts can preside over an ERISA plan's claim for reimbursement when the plan seeks equitable relief under 29 U.S.C. § 1132(a)(3).

Varco misconstrues this Court's holding in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). Varco asserts that this Court found that § 502(a)(3) of ERISA does not ever authorize the federal courts to preside over an ERISA plan's claim for reimbursement. (Varco Petition, pp. 7-8). That is not what this Court held

in *Great-West Life*. This Court specifically held that a plaintiff, pursuant to 29 U.S.C. § 1132(a)(3), can seek equitable restitution in the form of a constructive trust when: (1) identifiable monies are being held by a defendant; and (2) the plaintiff is entitled to the monies. *Great-West Life*, 534 U.S. at 213. Under Varco's interpretation of *Great-West Life,* all claims brought by an ERISA plan seeking reimbursement should be characterized as legal claims and should never be actionable under 29 U.S.C. § 1132(a)(3).

In *Great-West Life,* Plaintiff Great-West asked this Court to recognize the rights of ERISA plans and their fiduciaries to file suit in federal court to enforce reimbursement provisions. Plaintiff Great-West argued that its suit was authorized by § 502(a)(3)(B) because it sought restitution, which they characterized as equitable relief. *Great-West Life*, 534 U.S. at 212. This Court noted that not all restitution is equitable and clarified the distinction between legal and equitable restitution for purposes of ERISA. *Id.* at 213-14. The court found that restitution is legal when the plaintiff's claim seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Id.* at 213. The court further noted that:

> In contrast, **a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. [citations omitted]. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give**

> **a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner**.
>
> But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust or an equitable lien upon other property of the [defendant]." *Restatement of Restitution*, *supra*, § 215, Comment *a*, at 867. Thus, **for restitution to lie in equity, the action generally must seek** not to impose personal liability on the defendant, but **to restore to the plaintiff particular funds or property in the defendant's possession**.

Id. at 213. (Emphasis added).

Therefore, this Court did not find that § 502(a)(3) of ERISA never authorizes federal courts to preside over an ERISA plan's claim for reimbursement, but rather found that such an action can be brought under § 502(a)(3), so long as the monies over which the plan fiduciary seeks restitution or a constructive trust are being held by the defendant in the federal court lawsuit and in good conscience belong to the plaintiff.

B. The Seventh Circuit's decision clearly follows this Court's holding in *Great-West Life*.

Varco alleges that the decision below ignores the precedent set by this Court in *Great-West Life*. (Varco Petition, p. 7). This allegation is false, as a review of the decision below shows that the Seventh Circuit not only discussed the *Great-West Life* decision but relied upon it in

forming its decision. *See Admin. Comm. of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco*, 338 F.3d 680, 686-88 (7th Cir. 2003). The court below specifically noted that "[i]n *Great-West Life*, the Court considered a case with facts similar to this case and therefore bears scrutiny." *Id.* at 686.

In reaching its decision, the court below noted that this case was unlike *Great-West Life*, because the funds at issue here "are identifiable, have not been dissipated, and are still in the control of a Plan participant." *Id.* at 687. Relying on *Great-West Life's* reasoning that "plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession," the court below found that the Committee's reimbursement action is equitable because the funds sought are identifiable; in the control of Varco; and the Committee is rightfully entitled to the monies under the terms of the Plan. *Id.* at 688. Therefore, the court below held that the Committee's claim was equitable under § 502(a)(3)(B) of ERISA, and that the district court properly exercised federal question subject matter jurisdiction. *Id.* at 688.

Federal courts throughout the United States have routinely held, based on this Court's decision in *Great-West Life*, that monetary payments in the form of equitable restitution are appropriate where the disputed funds are identifiable and traceable and in the control of a defendant in the action. *See Honolulu Joint Apprenticeship and Training Committee of United Assoc. Local Union No. 675 v. Foster,* 332 F.3d 1234, 1238 (9th Cir. 2003) (following *Great-West Life* and holding that equitable restitution in

the form of a monetary payment is appropriate where "identifiable and traceable" funds are in the control of a defendant); *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot and Wansbrough, P.C.*, No. 03-10195, 2003 U.S. App. LEXIS, at *18 (5th Cir. Dec. 17, 2003) (finding that the imposition of a constructive trust over specifically identifiable settlement funds was equitable in nature and permitted by § 502(a)(3)) (copy attached hereto as App. 1-28); *Forsling v. J.J. Keller & Associates, Inc.*, 241 F. Supp. 2d 915 (E.D. Wis. 2003) (applying *Great-West Life* and allowing equitable relief where the funds at issue were identifiable; had not been dissipated; were still in the control of the insurer; and in good conscience belonged to the sponsor pursuant to the subrogation provisions of its plan); *Primax Recoveries, Inc. v. Lee*, 260 F. Supp. 2d 43, 48 (D. D.C. 2003) (noting that the claim for restitution is equitable because the funds are in the possession of the defendant); *Wellmark, Inc. v. DeGuara*, 257 F. Supp. 2d 1209 (S.D. Iowa 2003) (allowing equitable relief under *Great-West Life* where a defendant had control of identifiable funds); *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F. Supp. 2d 1376 (M.D. Ga. 2002) (finding that the disputed funds were identifiable and traceable where the covered person's attorney was holding funds; thus, the plan was entitled to equitable relief); *IBEW-NECA Southwestern Health and Benefit Fund v. Douthitt,* 211 F. Supp. 2d 812 (N.D. Tex. 2002) (holding that the disputed funds in the participant's attorney's trust account were traceable and identifiable to the defendant and, therefore, the plan was entitled to equitable relief); *Bauer v. Camrud, Maddock, Olsen & Larson, Ltd.,* Nos. A3-00-161, A3-02-27, 2002 U.S. Dist. LEXIS 7246 (D. N.D. Apr. 22, 2002) (ruling that an ERISA plan fiduciary may pursue a reimbursement claim in the form of a constructive trust where the

funds at issue are preserved in an attorney trust account) (copy attached hereto as App. 29-36); *Allison v. Wellmark, Inc.*, No. C00-3015-MWB, 2002 U.S. Dist. LEXIS 24168 (N.D. Iowa Oct. 15, 2002) (concluding that a constructive trust is among the remedies available under § 1132(a)(3), as a means by which to compel restitution to an ERISA plan) (copy attached hereto as App. 37-57).

C. A claim for equitable restitution will not always lie.

Varco asserts that since all monies distributed to personal injury plaintiffs pass through the client trust fund account of their attorneys, a claim for equitable restitution will always lie and federal courts will be flooded with this type of litigation. (Varco Petition, pp. 10-11). This assertion is unfounded. As this Court found in *Great-West Life*, a claim for equitable restitution did not lie because defendants no longer possessed the funds. *Great-West Life*, 534 U.S. at 214. In *Great-West Life*, the funds from the settlement had been disbursed by two checks, with "one made payable to the Special Needs Trust and the other to respondents' attorney (who, after deducting his own fees and costs, placed the remaining funds in a client trust account from which he tendered checks to respondents' other creditors, Great-West and Medi-Cal)." *Id.*

Additionally, circuit courts have also dismissed claims for restitution because the defendant was not in possession of the funds. *See Gerosa v. Savasta & Co.*, 329 F.3d 317, 321-322 (2d Cir. 2003) (holding that the plaintiffs did not make out a claim under restitution because the monies sought by them were never in the possession of the defendant); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445

(5th Cir. 2002) (finding that there was no claim for restitution because the settlement proceeds were not in defendants' possession). Therefore, Varco's assertion that a claim for equitable restitution will always lie is without merit.

II. The decision below does not conflict with other circuit court decisions.

Varco asserts that the decision below creates an irreconcilable conflict among the circuits, especially with the Ninth Circuit's holding in *Westaff Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003). (Varco Petition, p. 11).

Varco alleges that the facts in *Westaff* are identical to the present case. (Varco Petition, p. 13). This is incorrect, because there is an important distinction between these two cases. The plaintiff in *Westaff* did initiate an action in federal court seeking a determination of the Plan's rights under ERISA, but the action was filed *before* this Court decided *Great-West Life* and *only* sought declaratory relief and specific performance. (A true and correct copy of Westaff's complaint is attached hereto as App. 58-61). This Court stated in *Great-West Life* that "specific performance . . . was not typically available in equity." *Great-West Life*, 534 U.S. at 211. Unlike the plaintiff in *Westaff*, the Committee here specifically sought restitution when it filed its action. *See Varco*, 338 F.3d at 683.

Westaff could not have realized the importance of specifically seeking restitution in the form of a constructive trust, which is the form of "equitable relief" that this Court recognized in *Great-West Life* is typically available in equity, even if the party seeks a monetary payment, so long as the funds are "identifiable" and the party seeking

the funds is entitled to them. *See Great-West Life*, 534 U.S. at 213. Thus, based on this Court's decision in *Great-West Life*, an important distinction exists among these cases, since the Committee's complaint does not suffer from the defect present in Westaff's complaint.[1]

Since the *Westaff* court did not address the issue of asserting restitution, it left intact the availability of restitution as "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). Therefore, the *Westaff* decision does not present an irreconcilable conflict with the panel below, as these cases dealt with different types of relief.

Even if *Westaff* did present a conflict, Varco fails to mention that the Ninth Circuit later clarified its holding in *Westaff* by finding that equitable restitution in the form of a monetary payment is appropriate where, as here, "identifiable and traceable" funds are in the control of the defendant in the action. *See Honolulu Joint Apprenticeship and Training Comm. of United Assoc. Local Union No. 675 v. Foster*, 332 F.3d 1234, 1238 (9th Cir. 2003). In *Honolulu*, the Ninth Circuit stated:

---

[1] The result in *Westaff* is much like *Hotel & Restaurant & Bar Employees Fringe Benefit Funds v. Mui Trong*, No. 01-873, 2002 U.S. Dist. LEXIS 1697 (D. Minn. Jan. 31, 2002) (copy attached hereto as App. 62-70). There, the Court held that equitable relief was not available under ERISA because the plan's complaint did not seek the type of equitable relief, restitution, that the Supreme Court in *Knudson* held was typically available in equity. *See also Pullins v. Associated Material Handling Inds., Inc.*, No. 1:03-cv-0099-JDT-WTL, 2003 U.S. Dist. LEXIS 12439, at * 7-8 (S.D. Ind. May 20, 2003) (noting that one of the reasons this Court concluded that Great-West sought legal restitution was because the petitioners did not seek to impose a constructive trust or equitable lien on particular property) (copy attached hereto as App. 71-78).

> Thus, equitable restitution is available where the specific *res* or funds can be identified and attached by equitable lien or constructive trust, but not where the plaintiff seeks to impose general personal liability as a remedy for the defendant's monetary obligations.

Id. at 1238.[2]

In *Honolulu*, the union sought reimbursement for monies it paid to a plan participant for the costs incurred for his training in the plumbing and pipefitting industry. *Id.* at 1236. While the court found that the union was seeking legal restitution not available under § 1132(a)(3) because the action sought to impose personal liability on the participant, the court noted that equitable restitution is available when there is an identifiable res, *i.e.* when money or property belonging to the plaintiff can clearly be traced to particular funds or property in the defendant's possession. *Id.* at 1238.

Thus, both circuits follow this Court's decision in *Great-West Life*, and hold that equitable restitution in the form of a monetary payment is appropriate where "identifiable and traceable" funds are in the control of a defendant. Therefore, there is no circuit split, and it is unnecessary for this Court to grant certiorari.

Varco further alleges that the decision below conflicts with the decisions of other circuits, noting that other circuits have adhered to this Court's admonition to look past the label attached to a suit filed under § 502(a)(3),

---

[2] Unlike *Westaff*, *Honolulu* was decided after this Court's decision in *Great-West Life*.

and determine whether the claimant is seeking to impose personal liability for traditionally legal remedies. (Varco Petition, p. 14). While this is true, Varco fails to mention that in doing so, these circuits further analyze whether the claim for restitution under ERISA is an equitable or legal claim. Consistent with this Court's decision in *Great-West Life*, when the funds are still in the possession of the defendant, circuit courts find that the claim is one for equitable relief under ERISA. *See Honolulu,* 332 F.3d at 1237-38 (following *Great-West Life* and holding that equitable restitution in the form of a monetary payment is appropriate where "identifiable and traceable" funds are in the control of a defendant); *Bombardier*, 2003 U.S. App. LEXIS, at *18 (finding that the imposition of a constructive trust over specifically identifiable settlement funds was equitable in nature and permitted by § 502(a)(3)); *Primax Recoveries, Inc. v. Young*, No. 02-2115, 2003 U.S. App. LEXIS 25786, at *4 (4th Cir. Dec. 18, 2003) (holding that because the funds at issue were within the defendant's possession, plaintiff could properly proceed under ERISA) (copy attached hereto as App. 79-83). *Cf. Gerosa v. Savasta & Co.*, 329 F.3d 317, 321-322 (2nd Cir. 2003) (finding that the plaintiffs did not make out a claim under restitution because the monies sought by them were never in the possession of the defendant); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir. 2002) (holding that the relief sought did not constitute restitution because the settlement proceeds were not in defendants' possession).

Thus, like the court below, other circuits also adhere to this Court's decision in *Great-West Life*, and analyze whether the claim is one for legal or equitable relief in determining whether an action can be maintained under ERISA. When the funds are in the possession of the

defendant, these courts conclude, as did the court below, that the claim is an equitable claim under ERISA. Therefore, this Court should deny review, because no inconsistent precedent exists among the circuit courts. Hence, there is nothing for this Court to review.

III. The decision below does not conflict with other decisions within the Seventh Circuit.

Varco alleges that the decision below creates an intra-circuit conflict with the Seventh Circuit's decision in *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544 (7th Cir. 2003). (Varco Petition, pp. 15-16). Varco is incorrect, because he unquestionably misstates the court's holding in *Sevilla*.

Varco asserts that in *Sevilla*, the Seventh Circuit "determined that an ERISA fiduciary's claim for reimbursement under the terms of the plan, no matter how drafted, is a legal claim for breach of contract, and thus not within the federal subject matter jurisdiction granted under 29 U.S.C. § 502(a)(3)."[3] (Varco Petition, p. 16). This is an incorrect summation of the Seventh Circuit's holding in *Sevilla*. In *Sevilla*, the Seventh Circuit did not conclude that an ERISA fiduciary's claim for reimbursement is *always* a legal claim for breach of contract, and in fact, specifically noted that the Supreme Court made clear in *Great-West Life* that an ERISA fiduciary cannot sue a plan participant or beneficiary under ERISA *unless* it is seeking equitable relief, which can include the imposition of a

[3] Respondent assumes that Varco meant to say under 29 U.S.C. § 1132(a)(3).

constructive trust on money claimed to be wrongfully withheld from the plaintiff. *Id.* at 547.

In *Sevilla*, Primax instituted a declaratory judgment action seeking entitlement to a declaration of its right under ERISA to reimbursement out of recoveries against third parties. *Sevilla*, 324 F.3d at 547. Applying *Great-West Life*, the court conducted an analysis to determine whether Primax's claim was an equitable claim available under ERISA. *Id.*

Primax argued that the money it sought should be thought of as a fund, a *res*, held by the third party's insurer and claimed by Primax but wrongfully withheld because of the lawyer's refusal to endorse the check. *Id.* at 548. The court disagreed because the funds were not in the possession of the defendant. *Id.* The court stated, "[s]o to this day the fund remains in the hands of the insurer, who is not a defendant. You can impose a constructive trust only on a defendant." *Id.* Thus, in *Sevilla*, there were no funds in the possession of the defendant as required by *Great-West Life* to assert a claim for equitable restitution under ERISA.

In both cases, the Seventh Circuit utilized the same analysis. Different results were reached because in *Sevilla*, the defendant did not have possession of the funds, while in the case below, Varco did have possession of the funds. Thus, there is no intra-circuit split within the Seventh Circuit.

Additionally, the decision below is in accord with other Seventh Circuit precedent. For example, in *Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan v. Wells*, 213 F.3d 398, 401 (7th Cir. 2000), the Seventh Circuit found that a plan administrator's suit for a constructive trust over

settlement funds, presumed to be held in escrow by the participant's attorney, "nestles comfortably" within ERISA's concept of equity.

Furthermore, the decision below is in accord with the district court decisions within the Seventh Circuit. For example, in *Forsling v. J.J. Keller & Associates, Inc.*, 241 F. Supp. 2d 915 (E.D. Wis. 2003), a Wisconsin district court, applying *Great-West Life*, found that a plan sponsor could maintain an equitable claim under § 502(a)(3). The court specifically stated that "*Knudson*, by its own language, did not bar plan administrators from bringing an action to obtain reimbursement for benefits they paid." *Id.* at 919. The court also noted that the mere fact the plan administrator was seeking money does not *ipso facto* turn the action into a legal action for damages, as the plaintiff had argued. *Id.* The *Forsling* court concluded that there was an equitable claim and awarded a constructive trust over the funds, because the funds were identifiable; had not been dissipated; were still in control of a defendant; and in good conscience belonged to the plan administrator pursuant to the subrogation provision of the Plan. *Id.*

There are also district court decisions, applying the same analysis as that applied by the court below, who have concluded that the action was based in law and not equity. In *Leipzig v. AIG Life Ins. Co.*, 257 F. Supp. 2d 1152 (N.D. Ill. 2003), an Illinois district court found that the insurer's restitution claim was not actionable under § 1132(a)(3), because the funds were not in the possession of the plan participant. Thus, the court below applies the same analogy as that utilized by the district courts within the Seventh Circuit.

Varco further asserts that the panel below is the first and only panel of the federal circuit courts of appeal to find federal subject matter jurisdiction for an ERISA plan administrator's claim for reimbursement against a plan participant's personal injury recovery. (Varco Petition, p. 16). This is clearly incorrect. As previously discussed, many other circuit courts have found that subject matter jurisdiction exists in these types of cases. *See Honolulu*, 332 F.3d at 1238 (following *Great-West Life* and holding that equitable restitution in the form of a monetary payment is appropriate where "identifiable and traceable" funds are in the control of a defendant); *Bombardier*, 2003 U.S. App. LEXIS at *18 (finding that the imposition of a constructive trust over specifically identifiable settlement funds was equitable in nature and permitted by § 502(a)(3)).

Based on the above, it is clear that there is no intra-circuit split in the Seventh Circuit regarding the availability of equitable relief under 29 U.S.C. § 1132(a)(3). Therefore, a review by this Court is not warranted on this basis.

IV. There is no issue of substantial importance.

There is no urgent need for this Court to review the decision below, as alleged by Varco. This Court has already outlined the circumstances under which a Plan can seek reimbursement under ERISA, and the court below followed its application. As previously discussed, this Court, the Seventh Circuit, other circuit courts, and other panels of the Seventh Circuit all agree that the federal courts have subject matter jurisdiction to preside over an ERISA plan's reimbursement claim against a plan participant who has made a personal injury recovery, so long as the

funds sought are identifiable; in the control of the defendant; and the Plan is rightfully entitled to the monies under the terms of the Plan. *See Great-West Life*, 534 U.S. at 213; *Varco*, 338 F.3d at 687; *Honolulu,* 332 F.3d at 1238; *Bombardier*, 2003 U.S. App. LEXIS at *18; *Wells*, 213 F.3d at 401. Thus, the issue of when a Plan can seek reimbursement under ERISA has been well established by this Court and followed by other courts. Therefore, there is no need for the Court to review this issue.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny Petitioner's Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

THOMAS H. LAWRENCE
JOHN M. RUSSELL
LAWRENCE & RUSSELL, LLP
5050 Poplar Avenue
Suite 1717
Memphis, Tennessee 38157
Telephone: (901) 844-4430
Facsimile: (901) 844-4435

BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN, Plaintiff-Appellee, versus FERRER, POIROT AND WANSBROUGH; ET ALS, Defendants, FERRER, POIROT AND WANSBROUGH; STEVEN MESTEMACHER, Defendants-Appellants.

No. 03-10195

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

December 17, 2003, Filed

COUNSEL: For BOMBARDIER AEROSPACE EMPLOYEE WELFARE BENEFITS PLAN, Plaintiff-Appellee: Neal Stuart Manne, Joseph Samuel Grinstein, Susman Godfrey, Houston, TX.

For FERRER, POIROT AND WANSBROUGH, STEVEN MESTEMACHER, Defendants-Appellants: John Thomas Kirtley, III, Ferrer, Poirot & Wansbrough, Dallas, TX.

For ELAINE CHAO, SECRETARY, DEPARTMENT OF LABOR, Amicus Curiae: Elizabeth Hopkins, US Department of Labor, Washington, DC.

JUDGES: Before JOLLY and WIENER, Circuit Judges and WALTER,* District Judge.

OPINION BY: WIENER

OPINION: WIENER, Circuit Judge:

---

* District Judge of the Western District of Louisiana, sitting by designation.

Defendants-Appellants Ferrer, Poirot & Wansbrough, P.C. (the "law firm") and Steven Mestemacher appeal the district court's grant of the summary judgment motion of Plaintiff-Appellee Bombardier Aerospace Employee Welfare Benefits Plan (the "Plan"), an ERISA-governed, self-funded employee welfare benefit plan, to enforce the terms of the Plan's reimbursement provision against the law firm and Mestemacher. They also appeal the district court's denial of their respective motions to dismiss the Plan's action for lack of subject matter jurisdiction and for failure to state a claim, as well as its denial of their joint motion for summary judgment. We affirm.

I. FACTS AND PROCEEDINGS

A. Background

The Plan was established by Bombardier Aerospace to provide managed care services for its employees and their dependents.[1] Mestemacher was an employee of Bombardier Aerospace and a participant in the Plan. After he was injured in an automobile accident, he sought $ 13,643.63 from the Plan for medical expenses. The Plan paid Mestemacher's medical expenses in that amount, subject to a "Reduction, Reimbursement and Subrogation" provision contained in the Plan's documents. That provision gave the Plan "the right to recover or subrogate 100% of the Benefits paid . . . by the Plan for Covered Persons to the extent of . . . [a]ny judgment, settlement, or payment made or to be made, because of an accident, including but not limited to insurance." The documents further specified

[1] *See* 29 U.S.C. § 1002(1).

that "attorneys fees and court costs are the responsibility of the participant, not the Plan."

Mestemacher retained the law firm on a one-third contingent fee basis to seek recovery from the tortfeasor responsible for the automobile accident. After negotiating a $ 65,000 settlement, the law firm received the settlement payment on Mestemacher's behalf and placed the funds in a trust account at Bank of America in the law firm's name.

B. The Instant Litigation

This action arises out of the Plan's efforts to obtain reimbursement for the funds advanced to Mestemacher. The Plan filed suit in district court against the law firm, Mestemacher, and Bank of America before Mestemacher's settlement funds were ever disbursed to him from the law firm's trust account at Bank of America.[2] In its efforts to recover the funds that it had advanced to Mestemacher for medical expenses, the Plan sought (1) the imposition of a constructive trust over $ 13,643.63 of the funds being held for Mestemacher in the law firm's trust account, (2) a declaration that the Plan is entitled to ownership of that amount out of the settlement funds that remained in the trust account, (3) an order directing the law firm and Bank of America to execute any instruments necessary to transfer legal title of the "converted property" to the Plan, and (4) a temporary restraining order and a preliminary

[2] Bank of America was voluntarily dismissed from this suit after settling with all parties.

injunction prohibiting the law firm from disbursing the share of the settlement funds claimed by the Plan.

In an agreed order, the law firm consented to hold $ 18,500.00 of the settlement proceeds in its trust account, an amount more than sufficient to satisfy the Plan's reimbursement demand. The law firm nevertheless maintained that it was entitled to one-third of the proceeds of the settlement ($ 21,666.66) plus costs ($ 302.24), by virtue of its contingent fee agreement with Mestemacher. The law firm and Mestemacher each filed a motion to dismiss for lack of subject matter jurisdiction, contending that § 502(a)(3) of ERISA does not provide a cause of action against an entity like the law firm, which is neither a plan fiduciary nor a signatory to the plan, and does not authorize the Plan's claim for a constructive trust over funds not in the possession of its participant, Mestemacher.

Agreeing with the Plan's assertion that it was seeking "equitable relief" within the contemplation of § 502(a)(3), the district court accepted subject matter jurisdiction over the Plan's action and denied Mestemacher's and the law firm's motions to dismiss. Agreeing further that the terms contained in the Plan's documents provide a right of reimbursement, the district court granted summary judgment in favor of the Plan and ordered the law firm to transfer to the Plan the sum of $ 13,643.63 from the settlement proceeds being held in its trust account. This judgment further ordered that nothing be deducted from the Plan's funds for attorneys' fees and costs.

Citing our opinion in *Sunbeam-Oster Company, Inc. Group Benefits Plan for Salaried and Non-Bargaining Hourly Employees v. Whitehurst,*[3] the district court observed that the Plan contained "clear and unambiguous reimbursement provisions, including a provision allowing the Plan reimbursement from third party beneficiaries such as settlement proceeds."[4] As for whether the Plan had stated a claim under § 502(a)(3), the court noted that the Plan did not seek to impose *in personam* liability on any of the defendants, but merely sought the *in rem* imposition of a constructive trust over funds in the trust account. Thus, the district court concluded, the Plan's claim was for "appropriate equitable relief" under § 502(a)(3) and fell comfortably within that jurisdictional grant. Finally, the court refused to apply either the Texas or the federal version of the common fund doctrine to block the Plan's recovery, noting that "the Plan expressly provides that attorney's fees and court costs are the responsibility of Mestemacher and not the Plan." Final judgment was entered in the Plan's favor, and Mestemacher and the law firm timely filed a notice of appeal.

---

[3] 102 F.3d 1368 (5th Cir. 1996).

[4] All parties agree that the Plan's language unambiguously provides for a right of reimbursement and subrogation. As neither party seeks a construction of the Plan's terms, we need not engage in application of the deference principles articulated by the Supreme Court in *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989).

II. ANALYSIS

A. Standard of Review

We review *de novo* both a grant of a motion to dismiss and a grant of a motion for summary judgment.[5] In our *de novo* review of a district court's ruling on a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), we apply the same standard as does the district court: "[A] claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief."[6]

B. Subject Matter Jurisdiction

To determine whether the district court properly exercised subject matter jurisdiction over the instant action, we first must decide whether § 502(a)(3) authorizes the Plan's suit for a constructive trust over the funds held in the law firm's trust account.[7] The law firm and Mestemacher assert two bases for holding that § 502(a)(3) does not authorize the Plan's suit. They first contend that, because the law firm was not a signatory to the Plan, it is

---

[5] *See St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440 n.8 (5th Cir. 2000).

[6] *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992); *see also St. Paul Mercury Ins. Co.*, 224 F.3d at 440 n.8 ("[T]he central issue [in reviewing a motion to dismiss] is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief.").

[7] *See Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 442 (5th Cir. 2002) ("ERISA grants the federal courts 'exclusive jurisdiction of civil actions under this title brought by . . . [a] fiduciary.'"). The parties agree that the Plan is governed by ERISA and that the Plan is a "fiduciary" under ERISA.

not a fiduciary; thus the Plan cannot maintain an action for equitable relief against the law firm under § 502(a)(3). They contend secondly that the Plan's action for a constructive trust is not one "typically available in equity" and thus falls outside § 502(a)(3)'s jurisdictional grant.

1. The "Universe of Possible Defendants" under § 502(a)(3).

Section 502(a)(3) authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."[8] The law firm and Mestemacher contend that this authorization is contingent on the existence of a professional or contractual relationship between the Plan and the particular defendant that is subject to suit. In other words, according to them, an entity must owe a duty to an ERISA plan before it can properly be named as a defendant in a § 502(a)(3) suit for equitable relief. Because it is not a signatory of the Plan, insists the law firm, it owes no fiduciary duty to the Plan, and thus no cause of action can be maintained against it under § 502(a)(3).[9] We disagree.

---

[8] 29 U.S.C. § 1132(a)(3).

[9] For purposes of this case, a person is a plan fiduciary to the extent that he exercises discretionary authority or control over the management or administration of the plan or its assets, or renders investment advice to the plan for compensation. *See* 29 U.S.C. § 1002(21)(A). The parties agree that the law firm is not a plan fiduciary.

Although neither we nor the Supreme Court has squarely addressed the question whether a plan participant's or beneficiary's attorney who possesses disputed settlement funds on his client's behalf can be subject to suit under § 502(a)(3), the Supreme Court has ruled that § 502(a)(3) liability is not dependent on an entity's status as a plan fiduciary. In *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*,[10] the Court squarely held that § 502(a)(3) authorizes suit against a non-fiduciary "party in interest" to a transaction prohibited under § 406(a).[11] In so holding, the Court rejected the Seventh Circuit's holding that no cause of action exists under § 502(a)(3) absent a substantive provision of ERISA expressly imposing a duty on the party being sued. The Court observed that § 502(a)(3) "admits of no limit (aside from the 'appropriate equitable relief' caveat . . .) on the universe of possible defendants."[12] Indeed, the Court noted that, in contrast to other provisions of ERISA which expressly delineate the entities subject to suit,[13] "§ 502(a)(3) makes no mention at all of which parties may

---

[10] 530 U.S. 238, 147 L. Ed. 2d 187, 120 S. Ct. 2180 (2000).

[11] *See id.* at 241. ERISA both imposes a general duty of loyalty on plan fiduciaries, § 406(a); 29 U.S.C. § 1104, and, "categorically bar[s] certain transactions deemed 'likely to injure the pension plan.'" § 406(a)(1); 29 U.S.C. § 1106.

[12] *Id.* at 244-246.

[13] For example, the following ERISA provisions explicitly delineate the entities subject to suit: (1) "§ 409(a), 29 U.S.C. § 1109(a) ('Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable');" and (2) "§ 502(l), 20 U.S.C. § 1132(1) (authorizing imposition of civil penalties only against a 'fiduciary' who violates part 4 of Title I or 'any other person' who knowingly participates in such a violation)." *Id.* at 246-47.

be proper defendants."[14] This is because "§ 502(a)(3) itself imposes certain duties, and therefore . . . liability under that provision does not depend on whether ERISA's substantive provisions impose a specific duty on the party being sued."[15]

The litigation in *Harris Trust* arose out of a soured business deal between an ERISA plan and a "party in interest." National Investment Services of America ("NISA") had been hired by the plan's administrator to act as an investment manager for the plan.[16] Because it had "discretionary control" over plan assets, NISA qualified as a plan fiduciary.[17] Salomon Smith Barney, Inc. ("Salomon") furnished the plan with broker-dealer services at the direction of the fiduciaries, thus qualifying under § 3(14) as a "party in interest."[18] During the relevant time, Salomon sold to the plan, through NISA, interests in several motel properties that later turned out to be worthless.[19]

On learning of the nature of this transaction, the plan's administrator and its trustee filed suit against Salomon under § 502(a)(3), claiming, *inter alia*, "that NISA, as plan fiduciary, had caused the plan to engage in a *per se* prohibited transaction under § 406(a) in purchasing the motel interests from Salomon."[20] Salomon countered that

---

[14] *Id.* at 246.

[15] *Id.* at 245.

[16] *See id.* at 242-43.

[17] *Id.* at 243.

[18] *See id.* at 242.

[19] *Id.* at 243.

[20] *Id.*

§ 502(a)(3) authorizes suit "only against the party expressly constrained by 406(a)," namely, the fiduciary who caused the party to enter into the prohibited transaction, and not the "counterparty to the transaction."[21] The Seventh Circuit agreed with Salomon, but the Supreme Court reversed for the reasons stated above.[22] Therefore, even though, in the instant litigation, the law firm is not a "party in interest," as that term is defined by ERISA,[23] the Supreme Court's reasoning in *Harris Trust* influences us to conclude today that § 502(a)(3) authorizes a cause of action against a non-fiduciary, non-"party in interest" attorney-at-law when he holds disputed settlement funds on behalf of a plan-participant client who is a traditional ERISA party. As *Harris Trust* makes clear, an entity need not be acting under a duty imposed by one of ERISA's substantive provisions to be subject to liability under § 502(a)(3).

To this end, we note that the law firm's reliance on the Seventh Circuit's opinion in *Health Cost Controls of Illinois, Inc. v. Washington*[24] in support of the law firm's contrary position – that an entity must be a plan fiduciary before it can be properly named as a defendant in a § 502(a)(3) action – is badly misplaced. The question before

---

[21] *Id.*

[22] *See id.* at 244-45.

[23] The term " 'party in interest' . . . encompasses those entities that a fiduciary might be inclined to favor at the expense of the plan's beneficiaries." *Harris Trust*, 530 U.S. at 242. Finding nothing in the record that would suggest that the law firm is an entity likely to be favored by the plan's fiduciaries, we will assume that the law firm is not a "party in interest."

[24] 187 F.3d 703 (7th Cir. 1999).

the *Health Cost* court was not, as here, which entities can be subject to suit under § 502(a)(3), but rather which entities are entitled to bring suit under § 502(a)(3). In *Health Cost,* the Seventh Circuit addressed, *inter alia,* whether the assignee of an ERISA plan's reimbursement claims qualified as an ERISA fiduciary and thus as a proper plaintiff in a suit for a constructive trust under § 502(a)(3). Although the court noted that a lawyer hired by an ERISA plan to bring suit on the plan's behalf is not an ERISA fiduciary, and thus not a proper plaintiff to a § 502(a)(3) action, it held that, because an assignee of a plan's reimbursement claims exercises greater discretion over the plan's assets than does the plan's lawyer, the assignee qualified as a fiduciary and thus as a proper plaintiff under § 502(a)(3).[25]

Without a doubt, the text of § 502(a)(3) places limits on the proper plaintiffs to a suit for equitable relief: As the language of that provision expressly states, a civil action for equitable relief may be brought only by a "participant, beneficiary, or fiduciary" of an ERISA plan.[26] Congress did not see fit, however, to include a similar limitation on the set of proper defendants to a § 502(a)(3) action, and we decline the law firm's invitation to impose such limits judicially today.[27]

---

[25] *See id.* at 709.

[26] *See Harris Trust,* 530 U.S. at 248 ("§ 502(a) itself demonstrates Congress' care in delineating the universe of plaintiffs who may bring certain civil actions.").

[27] The other cases cited by the law firm in support of its proposition that it must be a plan fiduciary to be a proper defendant under § 502(a)(3) are equally inapposite. The issue in each of these cases was

(Continued on following page)

In sum, the law firm's status as a non-fiduciary would have some relevance to this case if the Plan were seeking to saddle the lawyers with personal liability for the breach of a fiduciary duty. As it stands, however, the only action that the Plan asserts is one for equitable in rem relief under § 502(a)(3). As liability under that provision does not depend on whether a substantive provision of ERISA imposes a duty on the particular defendant subject to suit, we hold that the law firm, as counsel for the plan participant and stake holder of specifically identifiable settlement funds in a trust account – on that beneficiary's behalf – fits comfortably within the "universe of possible defendants" subject to suit under that provision.

2. "Appropriate Equitable Relief" under § 502(a)(3)

The law firm and Mestemacher contend next that, despite styling its action as one for a "constructive trust" over the funds contained in the law firm's trust account,

---

whether the plan could properly maintain an action against the defendant-attorney for either breach of contract or breach of fiduciary duty – not for equitable relief under § 502(a)(3). *See Southern Council of Indus. Workers v. Ford,* 83 F.3d 966, 969 (8th Cir. 1996) (subject matter jurisdiction exists over plan's claim for breach of fiduciary duty against beneficiary's attorney who signed the plan's subrogation agreement); *Witt v. Allstate Ins. Co.,* 50 F.3d 536, 538 (8th Cir. 1995) (beneficiary's insurer is not a fiduciary subject to liability to the plan for breach of fiduciary duty); *Hotel Employees & Rest. Employees Int'l Union Welfare Fund v. Gentner,* 50 F.3d 719, 721 (9th Cir. 1994) (beneficiary's attorney is not liable for breach of fiduciary for failing to reimburse plan prior to distributing settlement funds to the beneficiary); *Chapman v. Klemick,* 3 F.3d 1508, 1508-09 (11th Cir. 1993) (beneficiary's attorney is not a fiduciary subject to liability to the plan for breach of fiduciary duty).

the Plan actually seeks to impose personal liability on the defendants to enforce Mestemacher's contractual reimbursement obligation to the Plan for the amount he received in benefits. Thus, they argue, the Plan's suit is essentially legal in nature – as distinguished from equitable – and falls outside the scope of "appropriate equitable relief" permitted by § 502(a)(3). The Plan responds – correctly, we conclude – that because it seeks to recover specifically identifiable funds that are in the constructive possession and the legal control of the participant but belong in good conscience to the Plan, its action for a constructive trust in no way seeks to impose personal liability on either defendant. Instead, the Plan continues, it seeks relief that indeed is equitable in nature and thus authorized by § 502(a)(3).

In *Mertens v. Hewitt Associates,* the Supreme Court interpreted "appropriate equitable relief" under § 502(a)(3) to include only "those categories of relief that were typically available in equity."[28] Subsequently, the Court, in *Great-West Life & Annuity Insurance Co. v. Knudson,* elaborated on the distinction between "legal" and "equitable" relief, stating that "a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[29] On the other hand, reasoned

---

[28] 508 U.S. 248, 256, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993).

[29] 534 U.S. 204, 213, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002) (citations omitted). In *Knudson,* the plan administrator sought to recover benefits paid to a beneficiary following the latter's receipt of

(Continued on following page)

the Court, if "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains," "[the plaintiff's] claim is only that of a general creditor, and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'"[30] In such an instance, the plaintiff is seeking a legal remedy – the imposition of personal liability on the defendant to pay a sum of money to which the plaintiff is owed – so his claim falls outside § 502(a)(3)'s jurisdictional grant.[31]

Recently, in *Bauhaus USA, Inc. v. Copeland,*[32] we interpreted *Mertens* and *Knudson* in the context of a plan administrator's suit to recover benefits previously paid to a plan beneficiary, after settlement funds from a third party tortfeasor were received on behalf of the beneficiary. The administrator of the plan sought the imposition of a constructive trust over the portion of the funds that had

---

settlement funds from a third-party tortfeasor. *See Knudson,* 534 U.S. at 208. The funds, however, had been placed in a Special Needs Trust for the beneficiary to provide for her medical care pursuant to California law. *See id.* at 207-08. The Supreme Court rejected the plan administrator's argument that it sought equitable relief under § 502(a)(3), stating that "the funds to which [the plan] claims an entitlement under the Plan's reimbursement provision . . . are not in the [beneficiary's] possession." *Id.* at 214. As the plan essentially sought "the imposition of personal liability [upon the beneficiary] for the benefits" it had conferred, the Court held that its claim was legal, rather than equitable, in nature and thus fell outside the scope of relief authorized by § 502(a)(3). *Id.*

[30] *Id.* at 213-14 (citing *RESTATEMENT (FIRST) OF RESTITUTION* § 215 (1937)).

[31] *See id.* at 210 (citing *Mertens,* 508 U.S. at 256.)

[32] 292 F.3d 439 (5th Cir. 2002).

been placed in the registry of the Mississippi Chancery Court, pursuant to the terms of a tort settlement agreement, to satisfy any liens against the funds.[33] Focusing on the language in *Knudson* regarding the beneficiary's possession of the disputed funds, the panel majority in *Bauhaus* found the facts of the case before it legally indistinguishable from those considered by the Supreme Court in *Knudson*.[34] The court observed that the disputed funds in *Knudson* were outside the "possession and control" of the beneficiary, having been placed in a Special Needs Trust to cover the beneficiary's medical expenses.[35] Reasoning that funds placed in the court registry were just as much beyond the "possession and control" of the beneficiary as those placed in a Special Needs Trust, the panel majority held that the plan's suit did not lie in equity and was therefore unauthorized by § 502(a)(3).[36]

Although the facts of *Knudson* and *Bauhaus* resemble those in Mestemacher's case in several respects, those cases are significantly distinguishable from Mestemacher's. To verify this conclusion, one need only compare the facts of these three cases by answering the relevant three-part inquiry: Does the Plan seek to recover funds (1) that are specifically identifiable, (2) that belong in good conscience to the Plan, and (3) that are within the possession and control of the defendant beneficiary? In both *Knudson* and *Bauhaus,* as in the instant case, the benefit

---

[33] *See id.* at 441.

[34] *See id.* at 445.

[35] *See id.*

[36] *See id.*

plans sought to recover funds from a specifically identifiable corpus of money that they had paid out previously as benefits. Likewise, in each case, the plan's terms contained an express, unambiguous reimbursement provision which made the disputed funds "belong in good conscience" to the plan. It is, however, the third element of the inquiry – the defendant-beneficiary's "possession and control" over the disputed funds – that distinguishes *Knudson* and *Bauhaus* from the case before us today.

In *Knudson* and *Bauhaus,* the beneficiary had neither actual nor constructive possession or control over the funds. In *Knudson,* the funds had been placed in a Special Needs Trust, as mandated by California law, to provide for the beneficiary's medical care, and the trustee was totally independent of the plan beneficiary. Similarly, in *Bauhaus,* the funds had been deposited in the state court's registry in anticipation of an interpleader action to determine their ownership. Obviously, that court was totally independent of the plan beneficiary. Here, in stark contrast, the funds that the Plan is seeking to recover belong to the participant and are simply being held in a bank account in the name of the participant's attorneys, who are indisputably his agent. Unlike the beneficiaries in *Knudson* and *Bauhaus,* the Plan's participant, Mestemacher, has ultimate control over, and thus constructive possession of, the disputed funds. The law firm and Mestemacher concede that the law firm is merely holding the funds in its trust account on Mestemacher's behalf – as Mestemacher's agent – and is legally obligated to disburse the funds to Mestemacher the moment he directs their release. This crucial distinction is more than sufficient to warrant a finding that the Plan's action is indeed "equitable" in nature.

The Seventh Circuit's recent opinion in *Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Varco* offers further support for our determination that the Plan's action for a constructive trust lies in equity.[37] In *Varco,* the ERISA plan sought to enforce the provisions of a subrogation clause against a participant through imposition of a constructive trust over settlement funds from a third party tortfeasor.[38] The participant's attorney had accepted delivery of the funds from the tortfeasor on the participant's behalf prior to the plan's filing suit and, after taking out an amount sufficient to cover his fees, the lawyer had placed the remaining funds in a reserve account in the participant's name.[39] Noting that (1) the participant had "control" over the disputed funds, (2) the funds were "identifiable, and [had] not been dissipated," and (3) the funds, "in good conscience," belonged to the plan, the Seventh Circuit held that the plan's action for a constructive trust was equitable in nature and therefore authorized by § 502(a)(3).[40]

In making the same determination today, we remain unpersuaded by the contention voiced by the law firm during oral argument to the effect that Mestemacher lacks "possession and control" over the one-third share of the $ 18,500 contained in the trust account to which the law firm asserts ownership by virtue of its contingent fee agreement with Mestemacher. This assertion ignores Mestemacher's pre-existing contractual reimbursement

---

[37] 338 F.3d 680 (7th Cir. 2003).

[38] *See id.* at 683-84.

[39] *See id.* at 684.

[40] *See id.* at 687-88.

obligation to the Plan, which requires him to reimburse the Plan the full amount of the benefits that he had received from the Plan and to do so out of any third-party recovery, without deduction for attorney's fees and costs. This pre-existing reimbursement obligation to the Plan precluded Mestemacher from contracting away to the law firm that which he did not own himself, namely, the right to all or any portion of the $ 13,643.63 that rightfully belonged to the Plan. In essence, Mestemacher could not create a greater right in the funds by virtue of entering the contingent fee arrangement with the law firm than Mestemacher had himself.

In addition, Mestemacher's contingent fee agreement does not restrict his obligation to compensate the law firm solely to the proceeds of his recovery. Rather, that agreement creates an in personam obligation, requiring Mestemacher to pay counsel an amount equivalent to one-third of his recovery. Mestemacher is personally responsible to the law firm for its attorneys' fees in an amount equal to one-third of his recovery. The fact that he may have to satisfy some part or even all of this personal obligation out of his own pocket in no way diminishes his pre-existing reimbursement obligation to the Plan vis-a-vis the funds recovered from his tortfeasor. We are satisfied that neither Mestemacher's contingency fee agreement with the law firm nor the location of the settlement funds in the trust account affects his legal "possession and control" over the disputed $ 13,643.63. Our conclusion in this regard is consistent with Judge Posner's opinion for the Seventh Circuit in *Wal-Mart Stores, Inc. Assoc. Health and Welfare*

Plan v. Wells,[41] in which that court held, on substantially similar facts, that a plan administrator's § 502(a)(3) suit for a constructive trust over settlement funds presumed to be held in escrow by the participant's attorney "nestle[d] comfortably" within "ERISA's concept of equity."[42]

Having closely examined the substance of the relief sought in the case before us, we are convinced that, in its efforts to recoup the amount paid to Mestemacher in benefits, the Plan does not seek to impose personal liability on either Mestemacher or his counsel. Thus, we hold the Plan's requested relief – the imposition of a constructive trust over specifically identifiable settlement funds held in the trust account of the law firm as agent for Mestemacher – to be equitable in nature. Accordingly, we further hold that § 502(a)(3) authorizes the Plan's claim for relief, and we affirm the district court's exercise of subject matter jurisdiction over this action.[43]

---

[41] 213 F.3d 398, 401 (7th Cir. 2000).

[42] *Id.*

[43] We recognize that our holding today is at variance with the Ninth Circuit's recent opinion in *Westaff (USA), Inc. v. Arce*, 298 F.3d 1164 (9th Cir. 2002). In *Westaff*, the Ninth Circuit held that a plan administrator's suit to recoup benefits paid to a beneficiary upon the beneficiary's receipt of settlement funds from a third party tortfeasor was essentially legal in nature, even though the beneficiary had placed the funds in an escrow account in the beneficiary's name pending a determination of to whom the money was owed. *See id.* at 1167. Acknowledging that the disputed funds held in escrow were "specifically identifiable," the Ninth Circuit nevertheless held that the funds were "a legitimate personal injury settlement to which the beneficiary is entitled" and that the administrator's action was essentially "one for money damages" falling outside the jurisdictional grant of § 502(a)(3). *Id.* We perceive that decision to depart from the Supreme Court's opinions in *Mertens* and *Knudson*, and from our own precedent in

(Continued on following page)

C. Actual Fraud and Unjust Enrichment

We turn next to the question whether a showing of either actual fraud or unjust enrichment, or both, on the part of Mestemacher and the law firm is required before a constructive trust can be imposed on the disputed funds. Noting correctly that ERISA does not specify the elements of a constructive trust in a § 502(a)(3) action,[44] the law firm and Mestemacher maintain that this lacuna in the statutory text should be filled by Texas law. Under that State's law, a plaintiff seeking a constructive trust must establish, *inter alia,* (1) the breach of a fiduciary relationship or, alternatively, actual fraud, and (2) unjust enrichment of the wrongdoer.[45]

Bauhaus, so we decline to follow the Ninth Circuit's more restrictive view of the scope of "appropriate equitable relief" under § 502(a)(3).

[44] *See* 29 U.S.C. § 1132(a)(2).

[45] *See, e.g., Haber Oil Co. v. Swinehart,* 12 F.3d 426, 437 (5th Cir. 1994). We recognize in passing that our precedent interpreting Texas law as it relates to constructive trusts has not been altogether consistent. In some cases, we have interpreted Texas law as requiring a showing of actual fraud or breach of fiduciary duty prior to imposition of a constructive trust. *See id.* at 437 (the elements of a constructive trust under Texas law include, *inter alia,* "breach of a fiduciary relationship, or in the alternative, actual fraud . . . . ") (citing *In re Monnig's Dept. Stores, Inc.*, 929 F.2d 197, 201 (5th Cir. 1991)). More recently, we held that it was sufficient under Texas law for a plaintiff to show merely constructive fraud, as opposed to actual fraud or wrongdoing. *See Burkhart Grob Luft Und Raumfahrt GmbH & Co. v. E-Systems, Inc.,* 257 F.3d 461, 469 (5th Cir. 2001) (the elements of a constructive trust under Texas law include a showing of either actual or constructive fraud) (citing *Haber Oil Co., Inc. v. Swinehart,* 12 F.3d 426, 437 (5th Cir. 1994)). If indeed constructive fraud is all that is required under Texas law, then the district court clearly did not err in not making a finding of fraud, for the requirement of "constructive fraud" is "merely an expression of the idea that a constructive trust may arise in the

(Continued on following page)

In recognition of ERISA's overarching aim of national uniformity, we have consistently held that any hiatus in ERISA's text must be filled by application of federal common law rather than the law of any particular state.[46] Accordingly, Texas law is not directly applicable to the Plan's claim, and the Plan will not be required to establish actual fraud and unjust enrichment – unless, that is, some basis exists for concluding that these elements are required under a federal common law standard for the imposition of a constructive trust.

Although the law firm and Mestemacher argue alternatively that we should incorporate the Texas law elements of actual fraud and unjust enrichment into the federal common law rule, federal common law – like gaps in ERISA's statutory provisions – cannot be defined solely by reference to the law of but a single state. This is especially true when adherence to the strictures of Texas law would require the Plan to establish actual fraud on the part of either Mestemacher or the law firm, an element that has never been required by the Supreme Court or this

---

absence of fraud." SCOTT ON TRUSTS § 462 (4th ed. 2001). Nevertheless, because some confusion exists as to this issue, and because the issue was not briefed by the parties, we will assume arguendo for purposes of the instant analysis that Texas law requires a showing of actual fraud or breach of fiduciary duty prior to imposition of a constructive trust.

[46] *See Jamail, Inc. v. Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 303 (5th Cir. 1992) ("Both the legislative history and the case law pursuant to ERISA validate our application of federal common law to ERISA."); *see also Rodrigue v. Western and Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991) ("Congress intended that federal courts should create federal common law when adjudicating disputes regarding ERISA.").

Circuit. Indeed, as discussed in the preceding section, *Knudson* requires a § 502(a)(3) plaintiff seeking a constructive trust to show only the existence of "money or property identified as belonging in good conscience to the plaintiff [that can] clearly be traced to particular funds or property in the defendant's possession," and makes no mention of the necessity of showing actual fraud or wrongdoing on the part of the defendant.[47] Neither does *Bauhaus,* which contains our most recent discussion of the circumstances in which a constructive trust may be imposed under § 502(a)(3), suggest that a showing of actual fraud or wrongdoing is required.

Further, as did the *Knudson* Court in its efforts to define the contours of "appropriate equitable relief" under § 502(a)(3), we look to "standard current works, such as Dobbs, Palmer, Corbin, and the Restatements" in ascertaining the federal common law rule to be applied.[48] Of those works, two that have squarely considered whether a showing of fraud or wrongdoing is required for imposition of a constructive trust have concluded that such a trust may properly be imposed in the absence of fraud.[49] Based on these expressions, as well as the absence of any indication in our precedent or that of the Supreme Court to the effect that federal common law requires that actual fraud

---

[47] *Knudson,* 534 U.S. at 213.

[48] *Id.* at 716.

[49] SCOTT ON TRUSTS § 462 (4th ed. 2001) ("[T]here are numerous situations in which a constructive trust may be imposed in the absence of fraud."); 1 DOBBS LAW OF REMEDIES § 4.3(2) (2d ed. 1993) ("Sometimes it is still said that the constructive trust applies only to misdealings by fiduciaries or in cases of fraud . . . but this is a misconception.").

be established before a constructive trust can be imposed under § 502(a)(3),[50] we hold today that federal common law does not require a plaintiff in a § 502(a)(3) action to show that he was the victim of actual fraud or wrongdoing as a prerequisite to obtaining a constructive trust.[51]

As for the additional requirement of Texas law that the defendant must have been unjustly enriched at the expense of the plaintiff, it is axiomatic that a party who

---

[50] In considering whether federal common law permits imposition of a constructive trust in the absence of a showing of actual fraud or other wrongdoing, the Seventh Circuit has also answered the question in the negative. *See Health Cost Controls,* 187 F.3d at 711. Writing for the panel in *Health Cost,* Judge Posner noted that

> although the Ninth Circuit appears to believe that the imposition of a constructive trust in an ERISA case is permissible only when there has been a breach of trust, *FMC Medical Plan v. Owens,* 122 F.3d 1258, 1261 (9th Cir. 1997), it has given no reason for this belief and there is no basis for it either in ERISA or in the principles of equity. Granted that in times of yore the constructive trust was available only as a remedy against trustees and other fiduciaries, 1 Dobbs, *supra,* § 4.3(2), p. 597, there is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp.

Id.

[51] As today we hold that actual fraud is not an element required in a § 502(a)(3) action for a constructive trust, we do not reach the question whether the Plan has demonstrated actual fraud on the part of Mestemacher and the law firm. We note, however, that at least one other circuit has observed, on nearly identical facts, that the refusal of a participant's lawyer to turn over settlement proceeds that rightfully belonged to the plan constituted wrongdoing on the part of the lawyer. *See Wal-Mart Stores, Inc. Assoc. Health and Welfare Plan v. Wells,* 213 F.3d 398, 401 (7th Cir. 2000) (lawyer's refusal to hand over settlement check to which plan claimed entitlement by virtue of its unambiguous reimbursement provision was "clearly wrongful").

retains funds "belonging in good conscience to another" is unjustly enriched at that other party's expense. None disputes that the Plan's terms unambiguously state a right to recover benefits that it has previously paid, up to the full extent of any settlement proceeds obtained by the participant or beneficiary. Thus, the disputed funds "belong in good conscience" to the Plan, and the law firm's and Mestemacher's continued retention of these funds would unjustly enrich them at the Plan's expense. Accordingly, even if we assume arguendo that unjust enrichment is a prerequisite, the Plan has produced sufficient evidence that the defendants would be unjustly enriched, entitling the Plan to have a constructive trust imposed on the disputed settlement funds.

D. Common Fund Doctrine

Finally, we consider whether the Plan's claim is subject to either the Texas or the federal "common fund" doctrine. There is no substantive difference between the Texas and federal versions of this doctrine; in essence, both provide that "a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."[52] "The doctrine rests on the perception that persons who obtain the benefit of a lawsuit

---

[52] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980); compare *Lancer Corp. v. Murillo*, 909 S.W.2d 122 (Tex. Ct. App. 1995) ("Under the [Texas] common fund doctrine, the court may allow reasonable attorney's fees to a litigant who, at his own expense, has maintained a suit which creates a fund benefitting other parties as well as himself.") (cites omitted).

without contributing to its costs are unjustly enriched at the successful litigant's expense."[53] In the instant case, the district court found this doctrine inapplicable to the Plan's claim for benefits because the language of the Plan expressly provided – long before Mestemacher was injured and long before he retained the law firm on a contingent fee basis – that "[a]ttorney's fees and court costs are the responsibility of the participant, not the Plan." We agree.

Although we have yet to address whether equitable fee sharing is warranted under the common fund doctrine when the Plan language expressly provides to the contrary, we held in *Walker v. Wal-Mart Stores, Inc.* that, when a plan's terms give it the right to recover benefits "to the extent of any and all" settlement payments, but fail to specify who bears the responsibility for fees and costs, the plan is nevertheless entitled to full recovery of the amount of the benefits paid without offset for fees and costs.[54] Here, the Plan's terms not only give it the right to recover benefits "to the extent of any and all" settlement

---

[53] *Boeing*, 444 U.S. at 478; compare *Lancer Corp.*, 909 S.W.2d at 126 ("The common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the expenses.") (citing *Trustees v. Greenough*, 105 U.S. 527, 532-37, 26 L. Ed. 1157 (1881); *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799-801, 18 Tex. Sup. Ct. J. 120 (Tex. 1974)).

[54] 159 F.3d 938, 940 (5th Cir. 1998). Interpreting the plan's " 'any and all' language," the *Walker* panel held that such language "plainly means the first dollar of recovery (any) and 100% recovery (all) of the funds received by the plaintiff in the settlement, up to the full amount of the benefits paid." *Id.* The panel further noted that the fact that the plan did not "specifically mention attorneys' fees or set out detailed distribution procedures did not constitute silence or ambiguity on behalf of the plan," reasoning that ERISA plans should not be labeled "silent or unambiguous" simply for lack of "technical precision." *Id.*

payments, but explicitly state that the participant must bear the fees and costs associated with his tort action. Our holding in *Walker* thus supports our determination here that neither the federal nor Texas common fund doctrine may be invoked to prevent or reduce the Plan's recovery of the funds that it advanced to Mestemacher, up to the full amount of his recovery from the tortfeasor.

The Seventh Circuit's *Varco* opinion further supports this conclusion.[55] The *Varco* court refused to apply either the Illinois or federal common fund doctrine to defeat an ERISA plan's express provision that fees and costs were the sole responsibility of the participant.[56] Considering the Illinois doctrine first, the court held that, because application of that doctrine would contradict the express terms of the Plan, it was preempted by § 514 of ERISA.[57] Turning next to the federal common fund doctrine, the *Varco* court declined to offset the plan's recovery on that basis as well, noting that application of "federal common law to override the Plan's reimbursement provision would contravene, rather than effectuate, the underlying purposes of ERISA because the express terms of the Plan provided for the appropriate distribution of attorney's fees."[58] Thus, reasoned the Seventh Circuit, the federal common fund

---

[55] 338 F.3d 680 (7th Cir. 2003)

[56] *See id.* at 692-93.

[57] *See id.* at 690. In addition to complete preemption under § 502(2), ERISA § 514 provides for conflict preemption when a state statute "directly conflicts with ERISA's requirements that the plans be administered, and benefits be paid in accordance with plan documents." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 150, 149 L. Ed. 2d 264, 121 S. Ct. 1322 (2001); 29 U.S.C. 1144(a).

[58] *Varco*, 338 F.3d at 692.

doctrine should only be applied to offset an ERISA plan's recovery in the absence of controlling plan language that specifies the manner in which the costs of the underlying litigation are to be distributed.[59]

We agree with the Seventh Circuit's determination in *Varco* that the state and federal common fund doctrines are inapplicable when, as here, the controlling plan language clearly and unambiguously expresses that fees and cost are the sole responsibility of the participant. Accordingly, we hold that the district court correctly refused to apply either the Texas or federal common fund doctrines to allow a deduction from the Plan's recovery of a pro rata share of Mestemacher's attorney's fees and costs.

III. CONCLUSION

We affirm the district court's exercise of subject matter jurisdiction based on ERISA § 502(a)(3) over the Plan's action for a constructive trust because it is equitable in nature. Further, because federal common law does not require a showing of actual fraud or wrongdoing as an element of imposing a constructive trust, we affirm the district court's grant of the Plan's requested relief, despite an absence of such a showing. Finally, we affirm the district court's holding that neither the federal nor Texas common fund doctrine trumps the Plan's express language specifying that all fees and costs associated with the

---

[59] *Id.* (citing *McIntosh v. Pacific Holding Co.*, 120 F.3d 911, 912 (8th Cir. 1997); *Waller v. Hormel Foods Corp.*, 120 F.3d 138, 141 (8th Cir. 1997)).

underlying tort litigation are to be born by the participant. Accordingly, the district court's decision is, in all respects,

AFFIRMED.

2002 US DIST. LEXIS 7246

Jack Bauer, et al, Plaintiffs, -vs- Delvin Gylten, Defendant. Jack Bauer, et al., Plaintiffs, -vs- Camrud, Maddock, Olson & Larson, Ltd., Defendant.

A3-00-161, A3-02-27

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION

April 22, 2002, Decided

COUNSEL: For JACK BAUER, RICHARD BERGSTAD, JIM BESSINE, DONALD BRUEMMER, CLINTON BURGE, RUTH CHERMOK, DON DAWSON, DAN FINNIE, ROBERT JARDING, STEVE JUNKER, JAMES KAVANAUGH, KENNETH KLEVER, ROGER LARSON, DOUG MARTIN, FRANCIS MAZZA, STEVEN MILLER, RYAN PENDERGRAFT, RANDY STAINBROOK, plaintiffs (00-CV-161, 02-CV-27): David S. Anderson, Richard L. Evans, Kathleen M. Brennan, McGRANN SHEA ANDERSON CARNIVAL STRAUGHN & LAMB, MINNEAPOLIS, MN.

For DELVIN GYLTEN, defendant (00-CV-161): Randall Shane Hanson, Patrick J. Maddock, CAMRUD, MADDOCK, OLSON & LARSON, LTD, GRAND FORKS, ND.

For CAMRUD, MADDOCK, OLSON & LARSON, LTD., defendant (02-CV-27): Randall Shane Hanson, Patrick, J. Maddock, CAMRUD, MADDOCK, OLSON & LARSON, LTD, GRAND FORKS, ND.

JUDGES: RODNEY S. WEBB, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

OPINION BY: RODNEY S. WEBB

OPINION:

MEMORANDUM AND ORDER

I. Introduction

Before the Court are a several motions in each of the above captioned cases. First, in both cases there is a motion by plaintiffs for a temporary injunction and a preliminary injunction, as well as for hearings on both (doc. # 3 in A3-02-27; # 18 in A3-00-161). As explained below, these motions are **DENIED**. Second, plaintiffs seek to consolidate the two cases (doc. # 3 in A3-02-27; # 18 in A3-00-161). This motion is **GRANTED**. Finally, plaintiffs seek to amend the complaint in A3-00-161 (doc. # 18). This motion is also **GRANTED**. In addition to ruling on these motions, the Court essentially **REAFFIRMS** its earlier grant of summary judgment.

II. Background

The procedural history here is somewhat complicated, so the Court will briefly review it before proceeding. Defendant Delvin Gylten was covered by the ERISA plan of which plaintiff's are administrators; he was in an accident, and the plan paid for his medical bills. He then sought and recovered money from the third party tortfeasor who had caused the accident. Plaintiffs then initiated this action to recover ERISA benefits from Gylten pursuant to a subrogation agreement and various plan provisions. On cross motions for summary judgment, the Court on December 12, 2001, held that the plan could recover amounts paid dollar-for-dollar except to the extent the recovery was attributable to Gylten's wife. The Court did

not attempt to perform such an apportionment, however, and so did not enter any final judgment.

Then, on January 8, 2002, the United States Supreme Court decided *Great-West Life & Annuity Insurance Company v. Knudson,* 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002). In short, *Great-West* held that ERISA plans could not sue in law to recover plan benefits; such efforts at collection were limited to suits in equity. This Court considered that *Great-West* might have an effect on the ultimate outcome of the instant case, and so on January 28, 2002, it ordered the parties to provide additional briefing.

Before the time for briefing had run, plaintiffs commenced the action numbered A3-02-27, seeking injunctive relief requiring defense counsel to maintain the funds at issue and enjoin their distribution. They also sought to amend the complaint in A3-00-161 to add explicitly equitable remedies. The parties arranged a stipulation – approved by the Court – by which defense counsel agreed to maintain the funds, essentially giving plaintiffs what they sought as injunctive relief. This stipulation also extended the time for filing supplemental briefs; this period has now run and the Court has received and considered these briefs. The Court now enters several rulings on the motions before it.

III. Analysis

A. Temporary restraining order & preliminary injunction

As mentioned, the parties have essentially stipulated to the injunctive relief sought (doc. # 20 in A3-00-161). Therefore, the Court considers these motions moot, and

they are **DENIED**. The Court thanks the parties for working to achieve this result.

B. Motion to consolidate

In light of the above motion, there is little left in A3-02-27. However, to the extent any issues remain, it makes sense to resolve them together with the primary case. Therefore, the motion to consolidate cases A3-00-161 and A3-02-27 is **GRANTED**.

C. Motion to amend

Plaintiffs seek to amend the complaint in A3-00-161 to request the creation of a constructive trust, consisting of the monies which they claim under the plan and which defense counsel is currently holding, and transfer of that trust to them. This amendment would essentially bring their complaint in line with *Great-West*, as it seeks the kind of equitable relief the Supreme Court held ERISA authorizes plans to seek. The first question is thus whether to allow the amendment; assuming the Court does so, the substantive issues could then be addressed.

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party at this stage of a case "may amend [its] pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." This decision lies in the discretion of the trial court. *See generally Grandson v. Univ. of Minnesota,* 272 F.3d 568, 575 (8th Cir. 2001). A number of courts confronting the situation facing the Court here have concluded that amendments intended to reflect a recent change in decisional law are generally permissible. *See,*

e.g, Gregory v. Harris-Teeter Supermarkets, Inc., 728 F. Supp. 1259, 1260 (W.D.N.C. 1990); *Vanguard Savings & Loan Ass'n V. Banks,* 1995 WL 379999 (E.D. Pa. June 27, 1995).

The Court agrees with this general proposition, and finds its application appropriate here for several reasons. First, this case does not involve discovery; the parties submitted it for summary judgment on stipulated facts. There is therefore no real trial schedule which will be affected by amendment. Second, it is only proper that the decision here reflect the current state of the law, and this amendment is necessary to achieve that result. Therefore, the motion to amend is **GRANTED**, and the proposed amended complaint is **ORDERED FILED**.

D. Effect of *Great-West* on earlier summary judgment

In its December 12, 2001, order granting summary judgment to plaintiffs, the Court held that the plan language allowed plaintiff to collect, from defendant's third-party recovery, benefits paid on behalf of defendant except to the extent that the monies were attributable to defendant's wife's loss of consortium claim. The Court did not attempt to perform such an allocation, however, and the parties have not since put that issue before the Court. The only question at this point, therefore, is whether *Great-West* changes the Court's original ruling. The Court concludes that it does not.

The holding of *Great-West* is fairly limited. In it, the Court was required to construe ERISA § 502(a)(3), codified at 29 U.S.C. § 1132(a)(3), which provides in relevant part:

> A civil action may be brought –
>
> > (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

Plaintiff *Great-West*, an ERISA plan, had sued defendant Knudson to recover benefits it paid on her behalf after she was rendered a quadriplegic in a car accident. *Great-West*, 122 S. Ct. at 711. The procedural history of the case was quite complicated, and the Court will not dwell on that procedure here. *Id.* For purposes of this case, the key is that part of the relief *Great-West* sought was "judicially decreed reimbursement," which the Ninth Circuit ultimately held was not the sort of equitable relief authorized by § 502(a)(3). *Great-West* 122 S. Ct. at 712.

The Supreme Court granted certiorari and affirmed this conclusion. In so doing, it affirmed its earlier definition of "equitable relief" as "those categories of relief that were typically available in equity." *Id.* (citing *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 256, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993)). After characterizing the relief *Great-West* sought as "personal liability . . . for a contractual obligation to pay money," the Court concluded that because this was not relief typically available in equity, *Great-West* could not obtain it from Knudson. *Great-West* 122 S. Ct. at 713.

Of particular relevance to the instant case is the Supreme Court's recognition that permissible equitable relief could include restitution, so long as it was "in the

form of a constructive trust or equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-West* 122 S. Ct. at 714. The court would then order transfer of the property in trust to the plaintiff. *Id.* According to the Court, the key is that "the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Great-West* 122 S. Ct. at 714-15. While admitting that this was a fine distinction, the Court made clear that the language at issue necessitated that the distinction be drawn. *Great-West* 122 S. Ct. at 715, 717.

Here, the plaintiffs' original suit was for legal restitution, a kind of relief rendered unattainable by *Great-West.* They now seek to establish a constructive trust, however, and ultimately to compel its transfer to them, a form of relief explicitly authorized by *Great-West. Great-West* 122 S. Ct. at 714. Pursuant to a stipulation, defense counsel has agreed to hold the funds, making the money sought traceable to particular funds in the defendant's possession. *Id.* Thus, this seems to be the precise situation allowed in *Great-West*, and other courts in similar situations have also recognized as much by allowing ERISA plans to seek the relief plaintiffs here seek. *See, e.g., Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco,* 2002 U.S. Dist. LEXIS 530, 2002 WL 47159 (N.D. Ill. Jan. 14, 2002). Therefore, the Court must conclude that *Great-West* has no effect on its earlier ruling other than to change the form of relief granted and the equitable basis of such relief.

Defendant's brief on the effect of *Great-West* does not change this conclusion. Though he urges that the result

reached here is not, in fact, equitable in the sense of fairness, the Court cannot overlook the fact that the Supreme Court specifically suggested that transfer of a constructive trust is equitable relief under the rule of *Great-West*. Defendant also argues that a constructive trust is inappropriate because he has not been unjustly enriched or done something wrong; indeed, he will be left a debtor. The Court has previously made its sympathy for defendant's position clear, and this sympathy has not changed. However, the Court also previously rejected these arguments, and changing the form of relief pursuant to *Great-West* does not change the Court's underlying analysis.

In conclusion, the Court has reconsidered its earlier summary judgment in light of *Great-West* and has reached the following conclusions. First, the form of relief previously authorized is now clearly impermissible, but this is cured by plaintiff's amended complaint, which seeks a constructive trust. Second, the Court does not change its essential analysis and conclusion that the plan language entitles plaintiffs to recover monies paid on behalf of defendant except to the extent the recovery from which those monies come is attributable to defendant's wife. Finally, the Court will not rule on any such apportionment until the issue is fully and properly before it.

IT IS SO ORDERED.

Dated this 22nd day of April, 2002.

RODNEY S. WEBB, CHIEF JUDGE
UNITED STATES DISTRICT COURT

2002 U.S. DIST. LEXIS 24168

PAUL ALLISON, Plaintiff, vs. WELLMARK, INC., d/b/a BLUE CROSS AND BLUE SHIELD OF IOWA, Defendant.

No. C00-3015-MWB

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CENTRAL DIVISION

October 15, 2002, Decided

COUNSEL: For Paul J. Allison, PLAINTIFF: Raymond P. Drew, Drew Law Firm, Hampton, IA USA.

For Paul J. Allison, PLAINTIFF: Tom L. Drew, Lawyer Lawyer Dutton Drake, West Des Moines, IA USA.

For Wellmark, Inc., DEFENDANT: David M. Swinton, Ahlers Cooney Dorweiler Haynie Smith & Allbee, Des Moines, IA USA.

JUDGES: Judge: Mark W. Bennett, Judge.

OPINION BY: Mark W. Bennett

OPINION:

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PLAINTIFF'S MOTION TO REMAND

TABLE OF CONTENTS

I. INTRODUCTION AND BACKGROUND

A. Procedural Background

B. Factual Background

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

B. Analysis Of Wellmark's Motion For Partial Summary Judgment

1. Subject matter jurisdiction

2. Constructive trust

C. Allison's Motion To Remand

III. CONCLUSION

I. INTRODUCTION AND BACKGROUND

A. Procedural Background

On February 3, 2000, plaintiff Paul J. Allison filed a petition for declaratory judgment in the Iowa District Court In And For Franklin County seeking a declaration that defendant Wellmark, Inc. d/b/a Blue Cross and Blue Shield of Iowa ("Wellmark") had no right of subrogation to the proceeds of plaintiff Allison's underinsured motorist coverage. Defendant Wellmark removed this case to this court on February 18, 2000, pursuant to 28 U.S.C. § 1441. On February 28, 2001, defendant Wellmark filed its answer and prayed for a declaration from the court that Wellmark's subrogation rights extend to plaintiff Allison's underinsured motorist coverage.

On April 12, 2001, plaintiff Allison filed his Motion For Summary Judgment and defendant Wellmark filed its Motion For Partial Summary Judgment. The parties' cross-motions for summary judgment centered on the central issue in this case, whether defendant Wellmark is entitled to subrogation of plaintiff Allison's right to recovery of underinsured motorist coverage proceeds.

On July 30, 2001, after oral arguments on the parties' cross-motions for summary judgment, the court concluded that Wellmark's interpretation of the Plan's subrogation provision was not unreasonable. Thus, the court concluded that defendant Wellmark was entitled to subrogation of plaintiff Allison's right to recovery of underinsured motorist coverage proceeds and granted Wellmark's Motion for Partial Summary Judgment and denied Allison's Motion for Summary Judgment. This ruling would have been the final judgment in the case but for the fact that Wellmark did not seek summary judgment on the question of whether it owed Allison a reasonable attorney's fee in connection with his recovery of the underinsured motorist proceeds at issue in this litigation.

On January 8, 2002, the United States Supreme Court issued its decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002).[1] On March 1, 2002, in light of the *Knudson*

[1] In *Knudson,* the Court addressed the issue of the extent to which ERISA authorizes a plan administrator to enforce a plan's reimbursement provision. Janette Knudson, a beneficiary of an ERISA-governed employee welfare benefit plan, was severely injured in a car accident. 122 S. Ct. at 711. She was covered by an employee benefit plan. The plan included a reimbursement provision similar to the one at issue in the present case; the provision stated that the plan had " 'the right to recover from the [beneficiary] any payment for benefits' paid by the Plan that the beneficiary is entitled to recover from a third party." *Id.* Knudson filed a state tort suit against the manufacturer of the car in which she was riding and other tortfeasors. The parties subsequently negotiated a settlement and the tortfeasors paid the settlement money into a Special Needs Trust and gave the remainder to Knudson's attorney, who tendered a check in the amount of $13,828.70 to Great-West. Instead of cashing its check, however, Great-West filed suit, under ERISA § 502(a)(3), seeking to enforce the reimbursement provision of the plan and recover from the settlement proceeds the $411,157.11 it had paid

(Continued on following page)

decision, Wellmark requested that it be granted leave to amend its answer to include a request for the imposition of a collective trust on the proceeds of the underinsured motorist coverage and an award of interest. On July 1, 2002, the court found that Wellmark had established good cause to amend its answer to take the change in the decisional law into account and granted Wellmark's request for leave to amend its answer.

On August 29, 2002, defendant Wellmark filed its Motion for Partial Summary Judgment. In its motion, defendant Wellmark seeks summary judgment on the issue of its entitlement to imposition of a constructive trust. Plaintiff Allison filed a timely response to defendant Wellmark's motion in which he argues that the circumstances of this case do not establish Wellmark's entitlement to a constructive trust under Iowa law. Allison also argues that the court lacks subject matter jurisdiction over this matter.

On September 13, 2002, Plaintiff Allison filed a motion to remand which is grounded on his argument that the court does not have subject matter jurisdiction over this matter. Defendant Wellmark filed a timely response to Allision's motion to remand in which it asserts that because plaintiff Allison's claims are completely preempted by

---

for Knudson's medical treatment. The Supreme Court held that ERISA § 502(a)(3) did not authorize the action because the plan was seeking legal relief. 122 S. Ct. at 719. The Court, however, suggested that if the plan administrator had been seeking an equitable lien on particular property in the hands of the plan beneficiary, such a suit would sound in equity and would be authorized by § 502(a)(3). 122 S. Ct. at 714-15.

ERISA, the court has subject matter jurisdiction over the case.

The court heard telephonic oral arguments on defendant Wellmark's Motion for Partial Summary Judgment on October 8, 2002. At the oral arguments, plaintiff Allison was represented by counsel Raymond P. Drew of Drew Law Firm, Hampton, Iowa. Defendant Wellmark was represented by counsel David Swinton of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C., Des Moines, Iowa.

The court turns first to a discussion of the undisputed facts as shown by the record and the parties' submissions, then to consideration of the standards applicable to the motion for summary judgment, and, finally, to the legal analysis of whether defendant Wellmark is entitled to summary judgment on the issue of its entitlement to imposition of a constructive trust. The court will then address plaintiff Allison's motion to remand.

B. Factual Background

The record reveals that the following facts are undisputed. Plaintiff Paul J. Allison was an employee of the Curries Company on June 3, 1990. As an employee of the Curries Company, Allison had health care benefits through the Curries Company health benefits plan ("The Plan"). The Plan is self-funded by the Curries Company and is maintained pursuant to an Alliance Select Benefit Certificate. Defendant Wellmark provides certain administrative services and stop-loss coverage to the Curries Company with respect to the Plan pursuant to an Administrative Services and Financial Agreement. The Plan is an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001

et seq. ("ERISA"). Plaintiff Allison was furnished with a copy of the Plan.

On June 3, 1999, plaintiff Allison was severely injured in an automobile accident. Plaintiff Allison was a passenger in the automobile at the time of the accident. The accident was caused by the driver of the automobile in which Allison was a passenger. The driver of the automobile carried automobile insurance with the Hartford Insurance Company with a liability limit of $10,000. Plaintiff had automobile insurance with the Prudential Insurance Company which provided underinsured motorist coverage in the amount of $100,000.

As a result of the injuries sustained in the accident, plaintiff Allison incurred medical expenses in excess of $135,000. Plaintiff Allison's total damages for injuries sustained in the accident exceed the amount of automobile insurance coverage available to him. Following the accident, Allison made a demand on the Prudential Insurance Company for the limits of his underinsured motorist coverage. The Prudential Insurance Company subsequently paid to Allison underinsured motorist benefits in the amount of $100,000.

Defendant Wellmark has paid $126,067.17 in benefits for the medical expenses incurred by Allison as a result of the accident. The Plan contains the following provision with respect to subrogation:

> **. SUBROGATION**
>
> Once you receive benefits under this certificate arising from an illness or injury, we will assume any legal right you have to collect compensation, damages, or any other payment related to the

illness or injury, including benefits from any of the following:

. The responsible person's insurer.

. Uninsured motorist coverage.

. Underinsured motorist coverage

. Other insurance coverage.

You and your family agree to all of the following:

. You will let us know about any potential claims or rights of recovery related to the illness or injury.

. You will furnish any information and assistance we determine we will need to enforce our rights under this certificate.

. You will do nothing to prejudice our rights and interests.

. You will not compromise, settle, surrender, or release any claim or right of recovery described above, without getting our written permission.

. You must reimburse us to the extent of benefit payments made under this certificate if payment is received from the other party or parties.

You and your covered family member(s) must notify us if you have the potential right to receive payment from someone else. You must cooperate with us to ensure that our rights to subrogation are protected.

> We reserve the right to offset any amounts owed to us against any future claim settlement amounts.

Curries Company Alliance Select Health Benefits Certificate, Def.'s Ex. C at pp. 46-47. Wellmark first corresponded with Allison regarding its subrogation rights no later than August 30, 1999. In response to Wellmark's letter of August 30, 1999, Allison's counsel wrote to Wellmark on September 9, 1999. Allison's counsel's letter of September 9, 1999, does not mention the possibility of recovery under an underinsured motorist policy. On October 12, 1999, Wellmark wrote to Allison and his counsel. Wellmark advised both Allison and his counsel that Wellmark had a right of subrogation to the proceeds of underinsured motorist coverage and requested that Wellmark be kept informed of any settlement negotiations. On September 20, 1999, a check was issued to Allison from his automobile insurance carrier for his underinsured motorist coverage.

On October 19, 1999, Allison's counsel wrote to Wellmark, advising it that Allison had underinsured motorist coverage in the sum of $100,000. Allison's counsel did not inform Wellmark that the proceeds of that coverage had already been paid out. Allison's counsel indicated that it was his position that Allison's underinsured motorist coverage was not subject to subrogation. He requested that Wellmark provide him with any Iowa legal authority supporting its position that its right of subrogation extended to Allison's underinsured motorist coverage. On November 16, 1999, Wellmark wrote to Allison's counsel to advise him of the amount of benefits paid by Wellmark as of that date. On December 20, 1999, Wellmark responded to Allison's counsel's request to be supplied with legal

authority supporting its position that its right of subrogation extended to Allison's underinsured motorist coverage. There was no further correspondence between the parties prior to February 3, 2000, when plaintiff Allison filed the present case. On March 9, 2000, in a letter from Allison's counsel, Wellmark was advised for the first time that the proceeds of Allison's underinsured motorist coverage had been paid out to him.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Fed. R. Civ. P. 56 in a number of prior decisions. *See, e.g., Swanson v. Van Otterloo,* 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.,* 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill,* 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. #1 v. City of Sioux Ctr.,* 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part,* 202 F.3d 1035 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 61 (2000); *Tralon Corp. v. Cedarapids, Inc.,* 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firstar Bank Milwaukee, N.A.,* 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.,* 963 F. Supp. 805 (N.D. Iowa 1997). Thus, the court will not consider those standards in detail here. Suffice it to say that Rule 56 itself provides, in pertinent part, as follows:

> Rule 56. Summary Judgment
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to

> obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

Fed. R. Civ. P. 56(a)-(c) (emphasis added). Applying these standards the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct 2505 (1986); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377. With these standards in mind, the court turns to consideration of defendant Wellmark's Motion for Partial Summary Judgment.

B. Analysis Of Wellmark's Motion For Partial Summary Judgment

1. Subject matter jurisdiction

The court will initially take up plaintiff Allison's argument that the court lacks subject matter jurisdiction over this case. Thus, as a threshold issue this court must determine whether removal was appropriate. If it was not, the court does not have subject matter jurisdiction and the court must deny as moot defendant Wellmark's Motion For Partial Summary Judgment. A civil action is removable if the district court has "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441(b). It is uncontested that plaintiff Allison has pleaded only a state

law claim for declaratory judgment. As the Eighth Circuit Court of Appeals has observed:

> Under the "well-pleaded complaint" rule, "a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint." *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 14, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983). However, the well-pleaded complaint rule does not apply if Congress has evidenced an intent that federal law completely displace state law. "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L.Ed.2d 318 (1987).

Lyons v. Philp Morris Inc., 225 F.3d 909, 912 (8th Cir. 2000). Thus, under application of the complete preemption doctrine, because state common law claims are deemed to be recast as federal claims, the preempted state law claims give rise to federal question jurisdiction, and, as a result, provide a basis for removal. *Id.*

In *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 95 L. Ed. 2d 55, 105 S. Ct. 1542 (1987), the Supreme Court held that the "complete preemption" exception applies to § 1132(a) of ERISA, 29 U.S.C. § 1132(a), which is ERISA's civil enforcement scheme. *Id.* at 67; *see Lyons,* 225 F.3d at 912. Thus, a state-law claim seeking the sort of relief provided for in § 1132(a) is essentially transformed into a claim which is "federal in character" and which will support removal jurisdiction. *Metropolitan Life Ins. Co.,*

481 U.S. at 67; *Lyons,* 225 F.3d at 912. The question, then, is whether plaintiff Allison's state-law claim for declaratory relief falls within the scope of ERISA § 1132(a). Thus, if Allison could have brought his claim under ERISA § 1132(a), the claim must be deemed to be completely preempted, and the court is correct to exercise jurisdiction here.

Section 1132(a), in relevant part, provides:

> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title . . .

29 U.S.C. §§ 1132(a)(1)-(4).

The Eighth Circuit Court of Appeals has held that a fiduciary's claim against a plan beneficiary for specific performance of the plan's subrogation clause falls within § 502(a)(3)'s exclusive jurisdiction over suits to enforce the terms of the plan. *See Southern Council of Indus. Workers v. Ford,* 83 F.3d 966, 969 (8th Cir. 1996); *see also Lyons,* 225 F.3d at 912 (holding that plan fiduciaries' subrogation claims against tobacco companies for recovery of costs incurred due to tobacco related illnesses fells within § 502(a)(3)'s exclusive jurisdiction over suits to enforce the terms of the plan). In its *Ford* decision, the Eighth Circuit Court of Appeals considered whether subject matter jurisdiction existed over a claim by an ERISA plan to enforce the terms of a subrogation clause. *Ford,* 83 F.3d at 967-68. The Southern Council of Industrial Workers and the Southern Council of Industrial Workers Trust Fund ("Southern Council") maintained an employee benefit plan that provided health insurance. *Id.* at 967. The plan contained a subrogation clause providing that Southern Council would be subrogated to the rights of a beneficiary to receive or claim indemnification from a third party. *Id.* at 967-68. A beneficiary to the plan, Jacqueline Ford ("Ford") sustained injuries from a fall at a supermarket. After the plan paid $39,971.35 in medical benefits on Ford's behalf, Ford brought suit against the supermarket and eventually obtained a settlement of $150,000 from the supermarket's insurer. *Id.* at 968. Prior to the settlement, Ford and her attorney signed a subrogation agreement providing that they would reimburse the plan from the proceeds of any recovery for Ford's injuries. *Id.* After Ford and her attorney paid the fund only $10,000 in reimbursement for the benefits paid on Ford's behalf, Southern Council brought suit against Ford and her attorney seeking to recover the balance of the amounts it had paid on Ford's

behalf. *Id.* The district court ruled that there was no cognizable claim under ERISA for Southern Council's recovery of benefits paid on Ford's behalf. *Id.* The Eighth Circuit reversed, finding that Southern Council alleged an ERISA cause of action under § 1132(a)(3) to obtain equitable relief. *Id.* "Southern Council's allegation that Ford admittedly failed to reimburse it as required by the subrogation clause is a claim that Ford failed to comply with a term of the plan. Southern Council sought specific performance of Ford's obligation under the subrogation clause." *Id.* (citations omitted).

Although the *Ford* decision involved a plan's lawsuit against a plan beneficiary to enforce a plan's subrogation clause while this case involves a lawsuit brought by a plan beneficiary against the plan for declaratory relief that the plan has no right of subrogation to the proceeds of underinsured motorist coverage under its terms, the court concludes that this difference does not eliminate § 1132(a)(3) jurisdiction over this case. Here, plaintiff Allison is seeking to redress what he believes is a violation of the terms of the plan with respect to its right of subrogation. Such a claim falls squarely within the framework of §§ 1132(a)(1) and 1132(a)(3)(A).

Plaintiff Allison does not address the *Ford* decision in his moving papers. Rather, plaintiff Allison's argument that subject matter jurisdiction is lacking here is grounded on the Fifth Circuit Court of Appeals's recent decision in *Arana v. Oschner Health Plan, Inc.*, 302 F.3d 462, 2002 WL 1878714 (5th Cir. Aug. 15, 2002). In *Arana,* a dependent of a plan beneficiary, Arana, was severely injured in an automobile accident. The defendant, Ochsner Health Plan, Inc. ("OHP") provided health benefits to participants and beneficiaries of the plan pursuant to a Group Health

Services Agreement ("GHSA") between OHP and the employer. 302 F.3d 462, 2002 WL 1878714 at *1. After the automobile accident, Arana's health care providers submitted to OHP claims for services rendered to Arana, and OHP paid approximately $180,000 in health benefits for treatment of Arana's accident-related injuries. *Id.* Four automobile insurance policies provided coverage for the accident. Arana subsequently settled claims under the four policies for a total of $1,112,500. After receiving notification from OHP that claimed a contractual right to reimbursement of the health benefits it had paid on Arana's behalf, Arana filed suit against OHP in the Louisiana state district court. 302 F.3d 462, 2002 WL 1878714 at *2. In his state court petition, Arana requested a declaratory judgment "requiring OHP to release its notice of lien and to withdraw and release OHP's subrogation, reimbursement, and assignment claims" against him. Arana asserted that such claims violated La. Rev. Stat. 22:663. OHP removed Arana's lawsuit to the Eastern District of Louisiana, on the grounds that the petition asserts claims that were completely preempted by ERISA. OHP then filed a motion to dismiss or, alternatively, a motion for summary judgment. In response to OHP's motion to dismiss, Arana asserted that subject matter jurisdiction was lacking. 302 F.3d 462, 2002 WL 1878714 at *2, n.4.

The district court concluded that Arana's petition stated a claim for benefits under 29 U.S.C. § 1132(a) that was completely preempted by ERISA. In reversing, the Fifth Circuit Court of Appeals concluded that Arana's claim was not one for benefits under § 1132(a). 302 F.3d 462, 2002 WL 1878714 at *4. The court of appeals also concluded that Arana's cause of action under La.Rev.Stat. 22:663 was not within the scope of § 1132(a) as an action

"to enforce his rights under the terms of the plan." *Id.* In reaching this conclusion, the court of appeals noted that, because the terms of the plan were not of record, it was not persuaded that Arana was seeking a declaration that Louisiana state law controlled over plan provisions. The court went on to observe:

> Moreover, assuming arguendo that the terms of the GHSA are properly considered to be the terms of the LeCler plan, such an assumption still does not justify characterizing Arana's claim as one to enforce the plan's terms. Arana does not dispute that the GHSA affords OHP the subrogation and reimbursement rights it claims. Arana in fact concedes that he would owe a portion of his tort recovery to OHP if the terms of the GHSA were enforced, but he argues that the relevant provisions in the GHSA are illegal by operation of 22:663. Although Arana's suit to enforce state law over the terms of the plan may be "akin" to a suit to enforce the terms of the plan itself, the fact that a claim is akin to a cause of action authorized under section 502(a) is not enough to support a federal claim under ERISA.

302 F.3d 462, 2002 WL 1878714 at *5.

The *Arana* decision is distinguishable from the present case. In contrast to the petition involved in *Arana,* plaintiff Allison's petition does not assert that Wellmark's right to subrogation under the plan is unenforceable under state law. Instead, plaintiff Allison asserts that the plan does not provide for subrogation, and that the plan "is ambiguous in its terms as to what, if any, claims the Defendant could legally claim under the facts of this case." Complaint at ¶¶ 8-9. Moreover, plaintiff Allison expressly sought "a declaratory judgment construing the insurance

policy of the defendant and declaring that said defendant has no subrogation rights under the underinsured benefits of Plaintiff's automobile policy." Complaint at p. 2. Thus, Allison, unlike the plaintiff in *Arana,* is seeking an interpretation of the plan and a declaration of his rights under the plan. Such a prayer for relief falls squarely within the scope of §§ 1132(a)(1) and 1132(a)(3)(A). Therefore, the court concludes that plaintiff Allison's claims are completely preempted by ERISA and the court has subject matter jurisdiction to hear this matter.

2. Constructive trust

The court turns next to consider whether a constructive trust is available to protect the plan where a plan's beneficiary has obtained funds which are subject to subrogation.

The issue of whether a constructive trust is available under the facts of this case must be determined by application of federal common law. The federal common law in turn, may draw guidance from analogous state law. *See Wegner v. Standard Ins. Co.,* 129 F.3d 814, 818 (5th Cir. 1997); *Jones v. Georgia Pacific Corp.,* 90 F.3d 114, 116 (5th Cir. 1996); *Todd v. AIG Life Ins. Co.,* 47 F.3d 1448, 1451 (5th Cir. 1995); *Brandon v. Travelers Ins. Co.,* 18 F.3d 1321, 1325 (5th Cir. 1994); *Heasley v. Belden & Blake Corp.,* 2 F.3d 1249, 1257 (3d Cir. 1993); *McMillan v. Parrott,* 913 F.2d 310, 311 (6th Cir. 1990). A constructive trust is "an equitable remedy compelling a person who has property to which he is not justly entitled to transfer it to the person entitled." *United States v. Pegg,* 782 F.2d 1498, 1499 (9th Cir. 1986). A constructive trust is among the remedies available to a court of equity and is therefore

available under 29 U.S.C. § 1132(a)(3), as means by which to compel restitution to an ERISA plan. *See Mertens v. Hewitt Assocs.,* 508 U.S. 248, 250, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993); *Amalgamated Clothing & Textile Workers v. Murdock,* 861 F.2d 1406, 1413 (9th Cir. 1988).

Under Iowa law, a constructive trust is an equitable remedy and is appropriate in three instances: actual fraud, constructive fraud, or equitable principles other than fraud. *See Koster v. City of Davenport,* 183 F.3d 767, 769 (8th Cir. 1999); *Berger v. Cas' Feed Store, Inc.,* 577 N.W.2d 631, 632 (Iowa 1998); *In re Estate of Peck,* 497 N.W.2d 889, 890 (Iowa 1993); *Slocum v. Hammond,* 346 N.W.2d 485, 493 (Iowa 1984); *Regal Ins. Co. v. Summit Guar. Corp.,* 324 N.W.2d 697, 704 (Iowa 1982); *Loschen v. Clark,* 256 Iowa 413, 419, 127 N.W.2d 600, 603 (1964); *see also In re Marriage of Jones,* 451 N.W.2d 25, 26 (Iowa Ct. App. 1989). "Other circumstances supporting imposition of equitable principles include bad faith, duress, coercion, undue influence, abuse of confidence, or any form of unconscionable conduct or questionable means by which one obtains the legal right to property which they should not in equity and good conscience hold." *In re Estate of Welch,* 534 N.W.2d 109, 111 (Iowa Ct. App. 1995). "The party who seeks the imposition of a constructive trust must establish the right by clear, convincing, and satisfactory evidence." *Neimann v. Butterfield,* 551 N.W.2d 652, 654 (Iowa Ct. App. 1996); *see Slocum,* 346 N.W.2d at 493; *In re Estate of Welch,* 534 N.W.2d at 111; *James v. James,* 252 Iowa 326, 330, 105 N.W.2d 498 (1960); *see also In re Estate of Farrell,* 461 N.W.2d 360, 361 (Iowa Ct. App. 1990).

Wellmark concedes that Allison is not guilty of actual or constructive fraud under the first two grounds. Rather, it argues that the third ground is applicable because it is

inequitable for Allison to retain the proceeds of the underinsured motorist coverage in light of the plan's subrogation provision and this court's prior determination that Wellmark is entitled to the underinsured motorist coverage proceeds under the subrogation provision. Given that the court has previously determined that Wellmark is entitled to the underinsured motorist coverage proceeds pursuant to the plan's subrogation provision, the court concludes that equity requires the imposition of a constructive trust on the insurance proceeds at issue in this case. Therefore, the court grants defendant Wellmark's Motion For Partial Summary Judgment and orders that the underinsured motorist coverage proceeds are to be held in constructive trust for Wellmark.

C. Allison's Motion To Remand

In his motion to remand, Allsion asserts that this matter should be remanded to state court because this court lacks subject matter jurisdiction. Allison reiterates the jurisdictional arguments he raised in his resistance to Wellmark's motion for partial summary judgment. For the reasons discussed above, the court concludes that plaintiff Allison's claims are completely preempted by ERISA, and, thus, the court has subject matter jurisdiction here. Therefore, plaintiff Allison's motion to remand is denied.

III. CONCLUSION

The court concludes that Allison's claims for relief fall within the scope of §§ 1132(a)(1) and 1132(a)(3)(A). Therefore, the court concludes that plaintiff Allison's claims are completely preempted by ERISA, and the court has subject matter jurisdiction over the case. The court further

concludes that, in light of the fact that this court previously determined that Wellmark is entitled to the underinsured motorist coverage proceeds pursuant to the plan's subrogation provision, equity requires the imposition of a constructive trust on the insurance proceeds at issue in this case. Therefore, the court grants defendant Wellmark's Motion For Partial Summary Judgment and orders that the underinsured motorist coverage proceeds are to be held in constructive trust for Wellmark.

Because the court concludes that it has subject matter jurisdiction over this matter, Allison's motion to remand is denied.

It appears to the court that the only matter left unresolved in this litigation is the question of whether Wellmark owes Allison a reasonable attorney's fee in connection with his recovery of the underinsured motorist proceeds at issue in this case. The parties are urged to attempt to resolve this issue amongst themselves in order to expedite the entry of a final judgement and the filing of any appeals the parties may wish to take in this case. To that end, the parties are directed to confer within the next month in an attempt to resolve the fee issue amongst themselves. The parties shall file a status report **not later than November 15, 2002**, addressing whether the parties have been able to resolve the fee issue and the need for the court to hold a bench trial on the fee issue.

IT IS SO ORDERED.

DATED this 15th day of October, 2002.

Judge: Mark W. Bennett

Mark S. Sifferman, #006600
NORLING, KOLSRUD, SIFFERMAN & DAVIS, P.L.C.
3101 North Central Avenue
Suite 690
Phoenix, Arizona 85012
(602) 264-5866

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

WESTAFF (USA), INC., a California corporation d/b/a Western Staff Services, as Administrator of the WESTERN STAFF SERVICES EMPLOYEE HEALTH PLAN, Plaintiff, v. BETTY ARCE, a single woman, Defendant.	No. CIV '99 1222 PHX ROS **COMPLAINT** (Filed Jul. 7, 1999)

1. Plaintiff is a corporation created and existing under the laws of the State of California.

2. Defendant is a citizen of the State of California.

3. Plaintiff is the Administrator of the Western Staff Services Employee Health plan ("the Plan"), an Employee Welfare Benefit Plan within the meaning of Employee Retirement Income Security Act ("ERISA"), 29

U.S.C. § 1002(1). Among other things, the Plan provides medical benefits for employees of the Plaintiff, and their dependents.

4. This court has jurisdiction of the matter pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331.

5. Plaintiff has standing to bring this action pursuant to 29 U.S.C. § 1132(a)(3).

6. Venue is proper in this district pursuant to 29 U.S.C. § 1132(e)(2) as the Plan is administered in this District through TPA of Arizona, Inc.

7. Defendant was an employee of Plaintiff. Defendant was "a covered person" under the terms and conditions of the Plan.

8. On or about November 19, 1997, Defendant was involved in an automobile accident which caused physical injury to her.

9. The ERISA benefit plan established and maintained by the Plaintiff paid medical expenses on behalf of Defendant in excess of $30,000.00.

10. The Plan, a portion of which is attached hereto as Exhibit 1, provides, among other things:

> . . . Accepting benefits under this Plan for those incurred medical or dental expenses automatically assigns to the Plan any rights the Covered Person may have to recover payments from any third party or insurer. This subrogation right allows the Plan to pursue any claim which the Covered Person has against any third party, or insurer, whether or not the Covered Person chooses to pursue that

> claim. The Plan may make a claim directly against the third party or insurer, but in any event, the Plan has a lien on any amount recovered by the Covered Person whether or not designated as payment for medical expenses. This lien shall remain in effect until the Plan is repaid in full. . . .

11. On or about February 5, 1998, Defendant executed a Reimbursement Agreement with Plaintiff, a true and correct copy of which is attached hereto as Exhibit 2. By that Reimbursement Agreement, Defendant agreed that in accordance with provisions of the Employee Benefit Plan, she agreed to reimburse and pay promptly to Plaintiff an amount from any recovery from third persons which amount was necessary to repay the benefits paid.

12. The Reimbursement Agreement further provides that Defendant would pay all attorneys' fees and costs incurred by Plaintiff in pursuing any rights under the Agreement.

13. Defendant has pursued a claim for personal injury against a third party. The third party has tendered $15,000 in satisfaction of the claim. The $15,000 is being held in a trust account.

14. Plaintiff and Defendant have attempted, but have failed to reach an agreement regarding the $15,000 and the Plaintiff's subrogation and reimbursement rights.

15. There is a controversy existing among the parties regarding the rights and responsibilities of the parties under the Plan and Reimbursement Agreement.

WHEREFORE, Plaintiff prays for judgment as follows:

1. Adjudicating the rights and liabilities of the parties hereto with respect to the obligations of reimbursement and subrogation under the Plan and the Reimbursement Agreement;

2. That an order issue requiring the specific performance of the Plan and the Reimbursement Agreement.

3. Such other and further relief the court deems just and proper.

RESPECTFULLY SUBMITTED this 7th day of July, 1999.

NORLING, KOLSRUD,
SIFFERMAN & DAVIS, P.L.C.

By /s/ Mark S. Sifferman
Mark S. Sifferman

2002 U.S. DIST. LEXIS 1697

HOTEL & RESTAURANT & BAR EMPLOYEES FRINGE BENEFIT FUNDS, Plaintiff, v. Mui Trong, as mother and natural guardian of Peter Truong, Defendant.

Civil File No. 01-873 (MJD/RLE).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

January 31, 2002, Decided

COUNSEL: For HOTEL & RESTAURANT & BAR EMPLOYEES FRINGE BENEFIT FUNDS, plaintiff: Thomas F Andrew, Aaron Robert Bransky, Brown Andrew Signorelli & Zallar, Duluth, MN.

For MUI TRUONG, defendant: Mark Leslie Knutson, Boyd Agnew Dryer & Storaasli, Duluth, MN

JUDGES: Michael J. Davis, United States District Court Judge.

OPINION BY: Michael J. Davis

OPINION:

MEMORANDUM AND ORDER

This matter is before the Court on the parties' cross-motions for summary judgment. For the reasons that follow, the Court grants Defendant's motion and denies Plaintiff's motion.

BACKGROUND

The parties have stipulated to the following facts. Minor Peter Truong was born on December 31, 1986. His

mother is Mui Trong ("Defendant"). Peter and Mui Truong are of Vietnamese and Chinese descent. Mui came to the United States as an adult refugee. Mui's knowledge of English is very limited. She must use a translator for her legal matters and other important affairs. On August 6, 1993, Peter was 6 years old. He lived at 326 South 16th Avenue East in Duluth, Minnesota. Down the hill from his residence is a street called "South Street," which abuts the freeway in that area. On the morning of the accident, Peter left his house and crossed the Avenue to try to play with some friends. He was not able to do so, and played in the yard adjoining South Street between 16th Avenue East and 15th Avenue East. At some point, he noticed a troll doll across the street from him. He then entered South Street to retrieve the doll. As he did so, he was struck by a garbage truck driven by James King Hall, Jr., and owned by TGR Sanitary Services of Duluth, Minnesota.

There are various disputes regarding how the accident occurred, including among other matters, the visibility of the driver and whether the driver should have anticipated Peter's entry into the street. When Peter was struck by the garbage truck, his right foot was dragged along the pavement by the truck's wheel for a distance of some feet. The skin and other soft tissues were abraded from the top of his foot.

As a result of this accident, Peter has had several surgeries. The top of his foot remains severely disfigured by a graft of skin and fat which was placed there to replace the damaged tissue. Although he can run and walk without a dramatic limp, he still does not quite have a normal gait. He has scars on his thigh and his back from the donor sites of the grafts which were used on his foot. His impairments affect his activities. He claims to have

emotional distress as a result of this disfigurement. It appears that further surgery may be required on his foot as his foot grows and he matures.

Following mediation, a settlement has been reached with the driver, the sanitary service and its insurer, State Farm Insurance. The amount of the settlement is $150,000.00. There has been a Petition filed for approval of the settlement in Minnesota District Court in the Sixth Judicial District in Duluth, Minnesota. The Petition for settlement includes payment to Mui Truong and some sums from that settlement, payment of attorney's fees and costs of the settlement, and placement of the remainder of the settlement either in a Settlement Preservation Trust for Peter Truong, or payment by way of a Structured Settlement.

Pursuant to an agreement between the Plaintiff and Defendant in this matter, $30,000.00 of the $150,000.00 settlement has been placed in an interest-bearing Escrow Account with Boyd Agnew Dryer & Storaasli, Ltd., attorneys for the Truongs, pending resolution of the underlying lawsuit.

The parties agree that the Truongs have not been fully compensated by this settlement. The medical expenses for Peter related to this accident and injuries sustained on August 6, 1993, exceed $45,000.00. Of those medical expenses, the garbage truck's No-Fault Insurance paid $20,000.00. Mui herself has paid for some of the medical expenses not covered by the insurance. The Hotel & Restaurant & Bar Employees Fringe Benefit Funds also paid $25,012.14 in medical benefits. The Hotel Plan claims a subrogation interest in the sum of $25,012.14 in the settlement proceeds. The Truongs deny that the Plan has

a valid subrogation interest in that sum. The dispute between the parties regards the nature and priority of any subrogation interest, not regarding its amount, if there is a subrogation interest in the settlement proceeds.

Plaintiff Hotel & Restaurant & Bar Employees Fringe Benefit Funds ("Funds") is a multi-employer, jointly-trusted fringe benefit plan created and maintained pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), as amended (29 U.S.C. § 186(c)(5)). The Fund is administered in accordance with the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended (29 U.S.C. § et seq.), and is exempt from federal income taxation pursuant to Internal Revenue Code Section 501(c)(9). The Fund is governed by and administered pursuant to the terms of the Agreement and Declaration of Trust establishing the trust fund ("Trust Agreement") and a Plan Document and Summary Plan Description ("Plan"). An employee of an Asian restaurant in Duluth, Minnesota, Mui was a participant in the Fund as provided under the terms of the Trust Agreement and Plan. The Fund also provided coverage for Peter as Mui's dependent.

On January 4, 1994, Mui signed a "Request for Payment and Subrogation Assignment" at the request of the Plan. That form was given to Mui by the Plan with the instruction that she had to sign the form before the Plan would pay medical bills relating to the accident. The Plan claims that the Plan and Plan terms that were in effect on the date of the accident of August 6, 1993, specifically the relevant subrogation language, are contained in Paragraph X11, pages 39 and 40 of the Plan. The Plan represents that there were no intervening Plans or changes in language regarding the subrogation provisions between

August 6, 1993 and the present time, apart from the changes indicated in the July 1, 1999 Plan. Mui claims that she did not receive a copy of the Plan before the time of the accident or before the time she signed the "Request for Payment and Subrogation Assignment" on January 4, 1994. Mui asserts that the only notice of the nature of Plaintiff's subrogation interest before Spring 2001, was the notice given in the "Request for Payment and Subrogation Assignment" executed on January 4, 1994. The Plan represents that it believes Mui was given a copy of the Plan before those times.

On May 7, 2001, Mui, on behalf of Peter, submitted for filing a Petition for Approval of the Settlement to a state court administrator. She also filed in state court a Notice of Motion and Memorandum to allow settlement without payment of the subrogation interest, and served a copy on the Plan. On May 18, 2001, the Plan filed the underlying action in federal court. Both parties have moved for summary judgment and waived oral argument. The Court sought additional briefing from the parties in light of the Supreme Court's recent decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635, 2002 WL 15399 (2002).

DISCUSSION

A. Standard

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.,* 980 F.2d 1217, 1219-20 (8th Cir. 1992). As the

United States Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Celotex,* 477 U.S. at 327 (quotation omitted).

B. ERISA § 502(a)(3)

Citing the recent Supreme Court decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635, 2002 WL 15399 (2002) and reiterating arguments made in her motion for summary judgment, Defendant argues that the underlying action was not properly commenced pursuant to ERISA because Plaintiff, the fiduciary, seeks legal not equitable relief. To the extent that Defendant characterizes this issue as dispositive of this case, the Court will assume that Defendant has waived her argument for *Younger* abstention. Plaintiff argues that the underlying action properly states a claim because the parties signed a Stipulation on June 22, 2001, agreeing that:

> 11. Jurisdiction of this action is based on § 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(e)(1), conferring jurisdiction on the District Courts to hear civil actions brought by a fiduciary pursuant to Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3).
>
> 12. Venue is appropriate in this District Court pursuant to § 502(e)(2) of ERISA, 29 U.S.C. § 1132(3)(2) in that this is the District in which the Fund is administered.

(Stipulation ¶¶ 11 and 12).

> The Court disagrees with Plaintiff's reasoning. ERISA § 502(a)(3) authorizes a civil action:
>
> > . . . by a . . . fiduciary (A) to **enjoin** any act or practice which violates . . . the terms of the plan, or (B) to obtain other appropriate **equitable** relief (i) to redress such violations or (ii) to enforce any provisions of . . . the terms of the plan.

29 U.S.C. § 1132(a)(3) (emphasis added). Plaintiff's Complaint contains two counts: (1) Count 1 for Violation of Plan Terms; and (2) Count 2 for Attorney's Fees. (Compl. at 4.) In Count I, Plaintiff seeks reimbursement of $25,012.14 "as a result of Mui Truong's breach of the terms of the Plan." (Compl. ¶ 20.) In the prayer for relief, in addition to attorney's fees, Plaintiff seeks "an award of $25,012.14 in **damages**." (*Id.* at 5, ¶ 1) (emphasis added). On the face of the Complaint, Plaintiff asserts no claim to enjoin a practice or for equitable relief against Defendant.

Recently in *Great-West,* petitioners sought an injunction to compel the payment of money past due under the reimbursement provision of respondents' ERISA Plan, or alternatively, restitution for money past due. 534 U.S. 204, 122 S.Ct. 708, 151 L. Ed. 2d 635, 2002 WL 15399. The Supreme Court held that because petitioners in that case sought legal relief, or the imposition of personal liability on respondents for a contractual obligation to pay money, ERISA § 502(a)(3) did not authorize the action. 534 U.S. 204, at *9. Accordingly, the Supreme Court affirmed summary judgment in favor of respondents. *Id.* The Supreme Court made clear that:

> A claim for money due and owing under a contract is quintessentially an action at law. Almost

> invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty. And [m]oney damages are, of course, the classic form of legal relief.

122 S. Ct. at 713, at *4 (citations and quotations omitted). The Supreme Court discusses at length petitioner's claim for restitution and when such a claim may be characterized as an "equitable" versus a "legal" remedy. 122 S. Ct. 708 at *6-*9. *But see* 122 S. Ct. 708 at *10-*11 (Stevens, J., dissenting), *11-*18 (Ginsburg, J., dissenting.) However, this Court need not reach that issue or discuss that analysis at this time. Unlike the petitioners in *Great-West,* Plaintiff here has not pled an action for specific performance or restitution. In fact, Plaintiff has not sought "to enjoin" Defendant or "equitable" relief against Defendant at all. Plaintiff's Complaint quite plainly seeks money damages based on a contractual obligation, or legal relief.

Furthermore, the parties' Stipulation does not bear on this issue. Whether this Court has jurisdiction pursuant to ERISA § 502(e)(1) over claims arising under ERISA § 502(a)(3) is a separate and distinct question from whether a claim has been properly asserted under ERISA § 502(a)(3). The Court cannot construe the parties' Stipulation any broader than the language it contains, and that language does not waive argument on whether a claim has been properly asserted under ERISA § 502(a)(3). Accordingly, because Plaintiff in this case is seeking legal relief, Plaintiff has failed to state a claim under ERISA § 502(a)(3).

CONCLUSION

Based on all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion for Summary Judgment (Clerk Doc. No. 13) is **DENIED**; and

2. Defendant's Motion for Summary Judgment (Clerk Doc. No. 8) is **GRANTED** to the extent that Plaintiff has failed to assert a claim for equitable relief under ERISA § 502(a)(3).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 31, 2002

Michael J. Davis

United States District Court Judge

LATASHA OLIVER-PULLINS, Plaintiff, vs. ASSOCIATED MATERIAL HANDLING INDUSTRIES, INC., Defendant.

1:03-cv-0099-JDT-WTL

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

May 20, 2003, Decided

COUNSEL: For Latasha Oliver-Pullins, PLAINTIFF: Brenda F. Rodeheffer, Monday Rodeheffer Jones & Albright, Indianapolis, IN USA.

For Associated Material Handling Industries, Inc, DEFENDANT: Charmagne Topacio, Craig G Penrose, Tressler Soderstrom Maloney & Priess, Durga M Bharam, Tressler Soderstrom Malony & Priess, Chicago, IL USA.

For Associated Material Handling Industries, Inc, Counter CLAIMANT: Charmagne Topacio, Craig G Penrose, Tressler Soderstrom Maloney & Priess, Durga M Bharam, Tressler Soderstrom Malony & Priess, Chicago, IL USA.

JUDGES: John Daniel Tinder, Judge, United States District Court.

OPINION BY: John Daniel Tinder

OPINION:

ENTRY ON MOTION TO DISMISS COUNT THREE[1]

The Defendant moves the court to dismiss "Count III: ERISA Violation" of the Complaint for failure to state a claim. The motion is opposed by the Plaintiff.

Count III alleges in relevant part that the Plaintiff was employed by the Defendant and was discharged; she carried health insurance and other benefits through her employment, the use of which had the potential of increasing costs to the Defendant; her husband had a life threatening illness requiring the use of such benefits; and in terminating her employment, the Defendant was motivated by an effort to avoid the costs of providing a benefit under the Employment Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). The Complaint asks the court to find that the Defendant violated ERISA and seeks to recover the Plaintiff's lost income, including the value of lost benefits, compensatory damages, punitive damages, pre- and post-judgment interest, reasonable attorney's fees and costs, and all other appropriate relief.

The Defendant seeks dismissal of the Plaintiff's claim to the extent she seeks benefits under ERISA Section 502(a)(1)(B). The Plaintiff's response clarifies that her only ERISA claim is that the Defendant violation Section 510 by terminating her employment because of concerns

---

[1] This Entry is a matter of public record and is being made available to the public on the court's web site, but it is not intended for commercial publication either electronically or in paper form. Although the ruling or rulings in this Entry will govern the case presently before this court, this court does not consider the discussion in this Entry to be sufficiently novel or instructive to justify commercial publication or the subsequent citation of it in other proceedings.

over what her husband's illness did or would do to its employee health insurance costs. Thus, the court understands that the Plaintiff does not assert a claim to benefits under 502(a)(1)(B) and such a claim is not in this case. This leaves only the Section 510 discharge claim brought under Section 502(a)(3). The Defendant contends that this claim should be dismissed because the relief requested is not recoverable under Section 502(a)(3).

The first question is whether the Defendant's motion ought to be treated as a motion to dismiss for lack of subject matter jurisdiction instead of a motion to dismiss for failure to state a claim. The asserted basis for this court's jurisdiction over Count III is federal question, 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e), in that the claim allegedly falls under ERISA Section 502(a)(3). (Compl.¶¶ 10, 11, 50.) A federal court has jurisdiction over an action authorized under Section 502(a). *See* 29 U.S.C. § 1132(e)(1); *Admin. Comm. v. Gauf,* 188 F.3d 767, 770 (7th Cir. 1999). A federal court lacks jurisdiction over a claim under Section 502(a)(3) seeking legal relief. *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 255-62, 124 L. Ed. 2d 161, 113 S. Ct. 2063 (1993). So, the Defendant's motion should be treated as a motion to dismiss for lack of subject matter jurisdiction.

Thus, the second question is whether the court has subject matter jurisdiction over the claim asserted in Count III. The claim is brought under ERISA Section 502(a)(3) which provides:

> A civil action may be brought – . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the

> plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

29 U.S.C. § 1132(a)(3). Therefore, the answer to the second question hinges on whether Count III seeks equitable relief.

The Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), guides this court to the answer. *Great-West Life* reaffirmed *Mertens* in concluding that Section 502(a)(3) authorizes suits seeking equitable relief, not legal relief. *Id.* at 221. In that case, the respondent Janette Knudson was covered by an ERISA plan of her then-husband's employer. The plan covered $411,157.11 of her medical expenses resulting from a car accident, all except $75,000 of which was paid by the petitioner Great-West. The plan contained a reimbursement provision, the rights to which were assigned to Great-West. *Id.* at 207. Great-West sued under Section 502(a)(3) to enforce the plan's reimbursement provision by requiring the Knudsons to pay the plan $411,157.11 of any proceeds recovered from third parties. *Id.* at 208. The issue was whether Section 502(a)(3) authorized the action. *Id.* at 206.

The Supreme Court answered, "no." The Court first rejected the argument that the suit was authorized because the petitioners sought an injunction to compel the respondents to reimburse the plan. *Great-West Life,* 534 U.S. at 210. The Court reasoned that "an injunction to compel the payment of money past due under a contract or specific performance of a past due monetary obligation, was not typically available in equity." *Id.* at 210-11 (footnote omitted).

The Court next rejected the argument that the suit was authorized because Great-West sought restitution, which it argued was a form of equitable relief. The Court recognized that restitution can take the form of equitable or legal relief, *id.* at 212, 218, and explained that whether restitution was "legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought." *Id.* at 213 (quotation omitted). Restitution was considered legal "[i]n cases in which the plaintiff could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him[.]" *Id.* (quotation omitted). A plaintiff's claim for restitution was legal in such cases "because he sought to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Id.* (quotation omitted). The Court distinguished equitable restitution as follows:

> a plaintiff could seek restitution *in equity,* ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession . . . . Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Great-West Life, 534 U.S. at 213-14 (citations omitted).

The Court concluded that Great-West sought legal restitution. This was based on the fact that Great-West claimed entitlement to funds which were not in the

respondents' possession. Thus, the Court reasoned: "The basis for petitioners' claim is not that respondents hold particular funds that, in good conscience, belong to petitioners, but that petitioners are contractually entitled to *some* funds for benefits that they conferred." *Id.* at 214. Another determinative fact was that the petitioners did not seek to impose a constructive trust or equitable lien on particular property. *Id.* The Supreme Court therefore held that because Great-West was seeking legal relief, that is, the imposition of personal liability on respondents for the payment of money, Section 502(a)(3) did not authorize the action. *Id.* at 221.

Application of the legal principles from *Great-West Life* leads to the conclusion that the Plaintiff's claim in Count III is for legal relief and therefore is not authorized by Section 502(a)(3). The Plaintiff does not assert title to any particular property or funds in the possession of the Defendant. She does not seek a constructive trust or equitable lien on particular funds or property. The basis for her claim is not that the Defendant has any *particular* funds or property that belong to her, but that she is entitled to *some* funds or property from the Defendant. The court therefore concludes that the claim asserted in Count III seeks legal relief which is not authorized by Section 502(a)(3).[2]

---

[2] If the Plaintiff argued that she seeks equitable relief by seeking an injunction to compel payment of backpay and the value of lost benefits, the relief sought no doubt would be considered legal under *Great-West Life.* If she seeks compensatory or punitive damages under Count III, such damages are not considered "appropriate equitable relief" and are thus not recoverable under Section 502(a)(3). *See Mertens,* 508 U.S. at 256; *Buckley v. Dement, Inc. v. Travelers Plan*

(Continued on following page)

The Plaintiff's attempts to distinguish *Great-West Life* are unavailing. She first argues that the basis for reimbursement there was a contract, whereas, here it is not. In explaining the difference between equitable restitution and legal restitution, the Court said that claims for legal restitution were viewed as breach of contract actions, whether or not the contract was actual or implied. *Great-West,* 534 U.S. at 213. Thus, an express contract is not required in order for a claim to seek legal relief.

The Plaintiff next argues that she seeks restitution, including reinstatement with backpay and benefits and the value of lost benefits. First, the Complaint does not seek reinstatement or benefits. Moreover, the fact that the Plaintiff seeks restitution is not enough to bring her claim within Section 502(a)(3). *See Great-West,* 534 U.S. at 212-18 (rejecting argument that claim was authorized under Section 502(a)(3) because petitioners sought restitution as not all claims for restitution are claims for equitable relief).

The Plaintiff also relies on footnote 4 of the *Great-West Life* majority opinion in claiming that backpay is an equitable remedy. This reliance is misplaced. The footnote responds to an argument by the dissent that Congress intended all restitution to be equitable relief under ERISA Section 502(a)(3). The majority indicated that the authorities relied on by the dissent to support that argument did not state that because backpay is restitutionary, it also is equitable. *Id.* at 218 n.4.

Admin. of Ill., Inc., 39 F.3d 784, 787 (7th Cir. 1994); *Harsch v. Eisenberg,* 956 F.2d 651, 660-61 (7th Cir. 1992).

The Plaintiff cites to the unpublished opinion of the district court in *Carnegie v. Mutual Savings Life Insurance Co.,* Civil Action No. CV 99-S-3292-Carnegie, 2002 U.S. Dist. LEXIS 21396 (N.D. Ala. Nov. 1, 2002), as support for her claim that the restitution she seeks, including payment of benefits, is equitable in nature. *Carnegie* does not assist the Plaintiff. First, no claim in that case was brought under ERISA Section 502(a)(3). Second, one claim was for a refund of premiums paid, which the court concluded constituted a claim to restore particular funds or property in the defendant's possession, making it an equitable claim. *Carnegie,* 2002 U.S. Dist. LEXIS 21396, [WL] at *52-53.

Finally, the Plaintiff cites to 29 U.S.C. § 1109, but for reasons which are not apparent to the court. She does not allege a breach of fiduciary duty by the Defendant, so it seems that this provision is inapplicable.

For the foregoing reasons, the Defendant's motion to dismiss Count III will be **GRANTED**.

ALL OF WHICH IS ORDERED this 20th day of May 2003.

John Daniel Tinder, Judge

United States District Court

2003 U.S. APP. LEXIS 25786

PRIMAX RECOVERIES, INCORPORATED, Plaintiff-Appellee, v. EDNA YOUNG, Defendant-Appellant.

No. 02-2115

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

July 29, 2003, Submitted
December 18, 2003, Decided

COUNSEL: Norris C. Ramsey, NORRIS C. RAMSEY, P.A., Baltimore, Maryland, for Appellant.

Brooks R. Amiot, David W. Stamper, PIPER RUDNICK, L.L.P., Baltimore, Maryland, for Appellee.

JUDGES: Before MICHAEL, TRAXLER, and KING, Circuit Judges.

OPINION BY: PER CURIAM:

Primax Recoveries, Inc. ("Primax") filed suit against Edna Young, seeking equitable and declaratory relief under the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001-1461 (West 1999 & Supp. 2003) ("ERISA"). After the parties filed cross-motions for summary judgment, the district court found Young sustained injuries in an automobile accident and her health care plan ("the Plan")[1] provided benefits. Young settled her claims with the tortfeasor for $25,000, and with her own

[1] Young was a participant of the Fresenius Medical Care North America Medical Plan, a health care plan sponsored by National Medical Care, Inc. Primax was an assignee of the Plan.

uninsured motorist carrier for $275,000. The district court granted Primax's motion for summary judgment, entered judgment in the amount of $154,830.74 and allowed Primax a constructive trust in that amount over funds held in trust by Young's counsel.

On appeal, Young argues Primax could not proceed under ERISA. Alternatively, Young argues Primax was not entitled to a constructive trust over the disputed funds and Maryland insurance law precluded Primax's attempt to seek reimbursement from those funds. Finding no error, we affirm.

This Court reviews an award of summary judgment de novo. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). This Court views the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Under ERISA § 502(a)(3) a civil action may be brought:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3).

Whether restitution is a legal or equitable remedy depends on the basis of the plaintiff's claims and the type

of underlying remedies requested. *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 213, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002). A plaintiff could obtain restitution in equity, generally in the form of a constructive trust or equitable lien, when "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* (citation omitted). When, however, the property or proceeds were dissipated so that no product remained, the plaintiff was considered a general creditor, and could not enforce a constructive trust or equitable lien. *Id.* at 213-14. "Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

Because the funds at issue are within Young's possession, this case is distinguishable from *Great-West. See Bauhaus USA, Inc. v. Copeland,* 292 F.3d 439, 445 (5th Cir. 2002) (noting fact that defendants not in possession of disputed funds was "extremely important" in *Great-West*). Because Primax seeks a constructive trust on identifiable funds that they claim belong in good conscience to them, and those funds are in Young's possession, we find Primax properly proceeded under ERISA.

Young next argues Primax was not entitled to the disputed funds under the terms of the Plan. Young first argues that under the language of the Plan, Primax could only recover benefits received from the Plan that were related to her medical expenses. Although Young claims the funds sought by Primax were not intended to compensate her for medical expenses, Young's general release entitling her to the uninsured motorist proceeds did not specify any

particular purpose for the funds. Because the specific language of the Plan allows Primax to assert its rights as to unspecified settlements, and the uninsured motorist proceeds were not specified for any purpose, we do not find Young's after-the-fact characterization of the purpose of those funds creates a genuine factual dispute that precludes summary judgment.

Young also argues the uninsured motorist proceeds do not constitute a settlement from a third-party within the terms of the Plan. Assuming without deciding the Plan limited its recovery rights to third-party settlements, we find the uninsured motorist proceeds were such a settlement. *See, e.g., Bill Gray Enters. Inc. Employee Health & Welfare Plan v. Gourley,* 248 F.3d 206, 220 (3d Cir. 2001).

Lastly, Young contends Maryland insurance law precludes Primax from seeking reimbursement from her uninsured motorist proceeds.[2] Young notes Maryland provides a statutory scheme mandating automobile insurance. *See Van Horn v. Atl. Mut. Ins. Co.,* 334 Md. 669, 641 A.2d 195, 200-03 (Md. 1994). Because the statutory provisions provide for certain set-offs or reductions from motor vehicle insurance coverage, Maryland courts have invalidated insurance provisions that allow for other reductions to their motor vehicle insurance policies. *See, e.g., Lewis v. Allstate Ins. Co.,* 368 Md. 44, 792 A.2d 272, 275 (Md. 2002).

Young argues these statutory provisions preclude Primax from reaching her uninsured motorist proceeds.

---

[2] Primax concedes ERISA does not preempt this provision.

However, Young relies primarily upon cases that concern when a motor vehicle insurance carrier may impose reductions or exclusions as to its coverage under Maryland's statutory scheme.[3] We find these cases to be inapposite. We therefore conclude that Maryland insurance law does not affect Primax's ability to reach Young's uninsured motorist proceeds.

Accordingly, we find the district court properly granted summary judgment in favor of Primax and affirm its order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

[3] Similarly, to the extent Young cites *Erie Ins. Co. v. Curtis*, 330 Md. 160, 623 A.2d 184 (Md.1993), we find it inapposite to these facts.